Supreme Court, U.S.
FILED
04 134 JUL 26 2004
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CALVIN GRIGSBY,

Petitioner,

v.

MIAMI-DADE COUNTY, FLORIDA, STEVEN B. BASS, ALEX PENELAS, KATHY JACKSON, MIRIAM ALONSO, RACHEL BAUM, and DELOITTE & TOUCHE, L.L.P.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

WILLIAM P. TEDARDS, JR.
1101 30TH Street, N.W.,
Suite 500
Washington, D.C. 20007
TEL: (202) 797-9135

LARRY A. STUMPF
Counsel of Record
Black, Srebnick, Kornspan & Stumpf, P.A.
201 South Biscayne Blvd.,
Suite 1300
Miami, FL 33131
TEL: (305) 371-6421

July 26, 2004

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

[THE ESSENTIAL FACTS: An attorney employed by Miami-Dade County, Florida supplied false evidence to federal prosecutors to instigate a malicious prosecution, which resulted in an alleged Fourth Amendment "continuing seizure" of the accused that lasted until the dismissal of the criminal charges.]

1 Under this Court's 1994 opinions in *Albright v. Oliver*, does a Fourth Amendment "continuing seizure" occur when a maliciously prosecuted person is forced to surrender his person to authorities, satisfy bail requirements, surrender his passport, report to a pretrial services unit on a weekly basis, appear in court for many days over many months, and suffer loss of business and employment opportunities, reputational harm, and the financial and emotional stress of preparing and presenting a defense to fabricated charges?

2. Where a County attorney acts solely as a complaining witness to instigate a federal prosecution, is he entitled to absolute immunity from a charge that he fabricated and supplied false evidence, in light of this Court's instructions in cases such as *Malley v. Briggs* (1986) and *Kalina v. Fletcher* (1997)?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The petitioner (Plaintiff/Appellant below) is:

Calvin Grigsby

The respondents (Defendants/Appellees below) are:

Steven B. Bass
Alex Penelas
Kathy Jackson
Miriam Alonso
Rachel Baum
Miami-Dade County, Florida
Deloitte & Touche, L.L.P.

The other Plaintiff/Appellant below is:

Fiscal Operations, Inc.

RULE 29 CORPORATE DISCLOSURE STATEMENT

The following Plaintiff/Appellant in the proceeding below is a non-governmental corporate party:

Fiscal Operations, Inc.

Fiscal Operations, Inc. is a wholly-owned subsidiary of another private company, Fiscal Funding, Inc. Neither company has any stock owned by a publicly-held company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW ii

LIST OF PARTIES iii

RULE 29 CORPORATE DISCLOSURE STATEMENT iv

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vii

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS AND ORDERS BELOW 1

BASIS OF JURISDICTION 2

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

The Course of Proceedings 2
The Relevant Facts 3

REASONS FOR GRANTING THE WRIT 6

1. The Court should grant the writ to insure that lower courts will entertain the Fourth Amendment "continuing seizure" concept discussed in *Albright v. Oliver*. 6

2. The Court should grant the writ to reverse a sharp departure from this Court's instructions with respect to absolute prosecutorial immunity. 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Albright v. Oliver,
510 U.S. 266 (1994) ..... ii, 6, 8, 9

Buckley v. Fitzimmons,
509 U.S. 259 (1993) 12

Burns v. Reed,
500 U.S. 478 (1991) 12

Butz v. Econonomou,
438 U.S. 478 (1978) 13

Kalina v. Fletcher,
522 U.S. 118 (1997) ..... ii, 12

Malley v. Briggs,
475 U.S. 335 (1986) ..... ii, 12

CONSTITUTIONAL PROVISIONS

Fourth Amendment ..... ii, 2, 3, 6, 7, 8, 10, 11, 13
Fourteenth Amendment 2, 3, 7

RULES

Fed. R. Civ. Proc. 12(b)(6) 3

STATUTES

28 U.S.C. § 1254 2
42 U.S.C. § 1983 2

IN THE
SUPREME COURT OF THE UNITED STATES

CALVIN GRIGSBY,

Petitioner,

v.

MIAMI-DADE COUNTY, FLORIDA, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

Calvin Grigsby respectfully petitions for a writ of certiorari to review the decision of a panel of the Eleventh Circuit Court of Appeals.

OPINIONS AND ORDERS BELOW

The panel decision for which the writ of certiorari is requested is *Fiscal Operations, Inc., and Calvin Grigsby v. Miami-Dade County, et al.*, 99 Fed.Appx. 880 (March 2, 2004), found at Appendix ("App") A at 1a through 3a. The Court of Appeals decision denying the petition for rehearing is App. E at 64a through 66a. The District Court decisions which the panel

reviewed are App. B at 4a through 24a, App. C at 25a through 43a, and App. D at 44a through 63a.

BASIS OF JURISDICTION

The panel decision and judgment for which review is sought was entered March 02, 2004.

An order denying the petition for rehearing was entered April 28, 2004.

28 U.S.C. § 1254 confers jurisdiction on this Court to review this decision by writ of certiorari.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This appeal involves: 42 U.S.C. § 1983 (App. G at 70a); the Fourth Amendment to the United States Constitution (App. H at 71a); and the Fourteenth Amendment to the United States Constitution (App. J at 73a through 74a).

STATEMENT OF THE CASE

The Course of Proceedings

Calvin Grigsby, the principal of a private company which had managed and operated the gantry cranes used in loading and unloading ships in Miami's commercial port, filed an action against the Miami-Dade County Attorney, Steven B.

Bass, his employer, and others under 42 U.S.C. § 1983, alleging that Bass and the others had instigated a malicious federal prosecution of Grigsby by supplying federal prosecutors with false evidence and withholding truthful evidence. Grigsby's complaint states that the falsity of the evidence, along with the evidence that was withheld, came out during the prosecution, which ended with a judgment of acquittal at the close of the government's case.

Grigsby's complaint alleges, *inter alia*, that the instigation of the prosecution resulted in a continuing seizure of Grigsby under the Fourth and Fourteenth Amendments to the United States Constitution and provides details of the seizure.

The district court, granting motions to dismiss, held that Bass was entitled to absolute immunity from this claim because supplying information to federal prosecutors was "associated with his role as an advocate of the County." With respect to the claim, itself, the district court said that "there is a clearly-established constitutional due process right not to be subjected to criminal charges on the basis of false evidence" but then dismissed the claim under Fed. R. Civ. Proc. 12(b)(6), refusing to entertain the "continuing seizure" concept. The appellate panel affirmed the district court per curiam.

The Relevant Facts

[On a motion to dismiss, the facts are the allegations of the complaint.]

Bass and others presented the Federal Bureau of Investigation and other representatives of the United States Attorney's office with fabricated evidence that Grigsby used "County Money" and "Public Funds" to make unauthorized expenditures not directly related to crane operations. This

fabricated evidence resulted in the malicious prosecution of Grigsby for theft of public funds and the attendant seizure of Grigsby.

When Bass and others fed this charge to the federal authorities, they had exclusive and superior knowledge of the design and history of the underlying franchisee/independent contractor relationship between Grigsby and the County -- information which would have demonstrated to the federal investigators that the "public funds" assertion was false. Instead of presenting this information honestly, they withheld the pertinent facts and gave the authorities only selective information, thereby misleading the investigators and the prosecutors, who then misled a grand jury. This produced a malicious prosecution that was doomed to fail eventually. (Complaint, Para. 47-48, 73-75) (App. K at 92a through 93a and 100a through 101a).

Examples of the fabricated evidence included an internal report from another defendant, Kathy Jackson. Jackson's report falsely stated that "Public Funds" were spent for political contributions, professional services of no value, meals and entertainment with no business purpose, and personal items. The report did not disclose that any such expenditures were made by Grigsby's company out of its own funds, usually in response to County demands, and were documented and fully disclosed by the company to the County. The report also did not disclose that Alex Penelas and Miriam Alonso (two other defendants) had both chaired the County's Maritime and Trade Committee and were both well aware of the manner in which County officials took advantage of Grigsby's company and others working at the Port to obtain private funds for a wide range of "pet projects" of County Commissioners. (Complaint, Para. 50, 31, 32) (App. K at 93a, and 86a through 87a).

The fabricated evidence also included a false statement of the seaport's books, procured by Bass and others from Deloitte & Touche (another defendant) solely to aid in instigating the prosecution. The false statement contradicted many years of financial statements to the contrary. The real financial statements, which Bass and the others withheld from the prosecutors, came out later during the government's case. (Complaint, Para. 40, 41, 51) (App. K at 89a through 90a and 93a through 94a).

The prosecution resulted in a judgment of acquittal at the close of the government case, after all of the withheld evidence was exposed. The judgment specifically stated that the "Public Funds" assertion "ignores established principles of agency, the terms of the 1988 Agreement, the manner in which both Fiscal and the County treated and reported revenues, and Florida law pertaining to obligations under a contract." The judgment also detailed many examples of the role of County officials in directing most of the alleged improper expenditures that Bass and the others used as a pretext to instigate the prosecution. (Complaint, Para. 35) (App. K at 88a).

As a result of the instigation of this malicious prosecution, Grigsby was forced to surrender his person to authorities, to satisfy bail requirements, to surrender his passport, to report to a pretrial services unit on a weekly basis, to appear in court for many days over many months, to suffer severe loss of business and employment opportunities, to suffer severe reputational harm, and to experience the severe financial and emotional strain of preparing and presenting a defense to the fabricated charges. (Complaint, Para. 82) (App. K at 103a).

REASONS FOR GRANTING THE WRIT

1. The Court should grant the writ to insure that lower courts will entertain the Fourth Amendment "continuing seizure" concept discussed in *Albright v. Oliver*.

Grigsby laid out, in detail, a fabrication of evidence claim, explaining how Bass and others created and transmitted to federal authorities false evidence (e.g., the Jackson "special" report and the Deloitte "restated" accounting treatment) and withheld other evidence which would have demonstrated that the proffered evidence was false (e.g., the fifteen year prior accounting and audit history, the design and history of the business relationship, the role of County officials in demanding most of the expenditures which were identified as "improper," and his company's meticulous documentation of every such expenditure in its own books, for the County's review), thereby misleading federal investigators and prosecutors who, in turn, misled a grand jury. When the evidence that Bass and the others withheld came out during the presentation of the government's case, the prosecution collapsed. The court entered a judgment of acquittal at the close of the government's case. But in the meantime, for months, Grigsby was seized and restrained, forced to surrender his person to authorities, satisfy conditions of bail, surrender his passport, report to pretrial services on a weekly basis, and appear and defend in court all day, for many days, at great personal and financial cost.

The district court and the appeal panel accepted the fundamental principle that "there is a clearly-established constitutional due process right not to be subjected to criminal charges on the basis of false evidence" (App. B at 19a)but then dismissed Grigsby's Fourth Amendment claim that he was subjected to a "continuing seizure" caused by the fabricated

evidence. Here is the claim, as it was presented in the complaint:

COUNT 4
UNREASONABLE SEIZURE AND RESTRAINT (FOURTH AND FOURTEENTH AMENDMENTS)
(Grigsby v. All Defendants)

80. The allegations of Paragraphs 1 through 58 and 73 through 79 are incorporated here by reference.

81. Using deliberately fabricated selective evidence while withholding the underlying pertinent facts, the Defendants deceived the prosecutor into believing that probable cause existed and proximately caused the deception of the grand jury, the initiation of a prosecution that was not backed by probable cause, and an unlawful seizure and restraint of Grigsby.

82. As a consequence of the wrongful actions of the Defendants, Grigsby was unlawfully seized and restrained (i.e., seized and restrained without probable cause) in that he was forced to surrender his person to authorities, to satisfy bail requirements, to surrender his passport, to report to a pretrial services unit on a weekly basis, to appear in court for many days over many months at the Government's command, to suffer severe loss of business and employment opportunities, to suffer severe reputational harm, and to experience the severe financial and emotional

> strain of preparing and presenting a defense to the fabricated charges.
>
> 83. Grigsby has been severely injured by this unlawful seizure and restraint, in violation of his Fourth and Fourteenth Amendment rights, and he is entitled to an award of compensatory damages from each of the Defendants, according to proof, in amounts to be established at trial.
>
> 84. In taking this egregious action, the Defendants were motivated by malice and have acted with reckless indifference to the Constitutional rights of Grigsby, and Grigsby is entitled to an award of punitive damages, from each of the Defendants, according to proof, in amounts to be established at trial.

(App. K at 102a through 103a).

This claim arises out of, and follows, the discussion of this Court in *Albright v. Oliver*, 510 U.S. 266 (1994). In her concurring opinion, Justice Ginsburg agreed with the plurality that a malicious prosecution claim is properly analyzed under the Fourth Amendment and then wrote separately to discuss the "seizure" concept further. Reviewing common law sources, Justice Ginsburg concluded that:

> The common law thus seems to have regarded the difference between pretrial incarceration and other ways to secure a defendant's court attendance as a distinction between methods of retaining control over a defendant's person, not one between seizure and its opposite.

> This view of the definition and duration of a seizure comports with common sense and common understanding. A person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip. He is required to appear in court at the state's command. He is often subject, as in this case, to the condition that he seek formal permission from the court (at significant expense) before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction. Pending prosecution, his employment prospects may be diminished severely, he may suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense.
>
> A defendant incarcerated until trial no doubt suffers greater burdens. That difference, however, should not lead to the conclusion that a defendant released pretrial is not still "seized" in the constitutionally relevant sense. Such a defendant is scarcely at liberty; he remains apprehended, arrested in his movements, indeed "seized" for trial, so long as he is bound to appear in court and answer the state's charges. He is equally bound to appear, and is hence "seized" for trial, when the state employs the less strong-arm means of a summons in lieu of arrest to secure his presence in court.

Albright at 278, 279.

With respect to when such a claim arises, Justice Ginsburg stated:

> Once it is recognized ... that Albright remained effectively "seized" for trial so long as the prosecution against him remained pending, and that Oliver's testimony at the preliminary hearing, if deliberately misleading, violated the Fourth Amendment by perpetuating the seizure, then the limitations period should have a different trigger. The time to file the § 1983 action should begin to run not at the start, but at the end of the episode in suit, *i.e.*, upon dismissal of the criminal charges against Albright. See *McCune v. Grand Rapids*, 842 F.2d 903, 908 (CA6 1988) (Guy, J., concurring in result) ("Where ... innocence is what makes the state action wrongful, it makes little sense to require a federal suit to be filed until innocence or its equivalent is established by the termination of the state procedures in a manner favorable to the state criminal defendant.").

(*Id.* at 280).

Albright, himself, abandoned his Fourth Amendment claim in the district court and did not attempt to reassert it in this Court.[1] In Justice Ginsburg's view, however, the claim was

---

1 Justice Ginsburg's opinion notes that Albright acquiesced (incorrectly) in a view that the statute of limitations would begin at the start of the episode rather than the end (*Id.* at 280) and "may have feared the court would narrowly define the Fourth Amendment's key term 'seizure'" (*Id.* at 277).

"neither substantively deficient nor inevitably time barred." (*Id.*)[2]

Justices Stevens and Blackmun, in an opinion dissenting from the plurality's main holding that a malicious prosecution must be examined only under the Fourth Amendment, included this statement in a separate comment directed to Justice Ginsburg's concurring opinion: "[We] agree with her explanation of why the initial seizure of petitioner continued until his discharge and why the seizure was constitutionally unreasonable." (*Id.* at 307). No justice expressed any disagreement with that portion of her opinion.

Count 4 of Grigsby's complaint states a Fourth Amendment cause of action against Bass and the others under the "continuing seizure" approach discussed above. That count should not have been dismissed for failure to state a claim. On *de novo* review, this Court should grant the writ and reverse that dismissal in order to insure that the lower courts do not undercut the "continuing seizure" concept.

2. The Court should grant the writ to reverse a sharp departure from this Court's instructions with respect to absolute prosecutorial immunity.

The district court accepted the complaint's allegation that "Bass presented the Federal Bureau of Investigation and

---

2 Grigsby's claim is not time barred, either. The judgment of acquittal at the close of the government's criminal prosecution came on June 7, 1999. Grigsby filed his original complaint November 26, 2001 and amended it on February 20, 2002. The applicable Florida statute of limitations is four years.

representatives of the U.S. Attorney's office with evidence that Grigsby used County money and public funds to make unauthorized expenditures not directly related to crane operations" (App. B at 9a) but then concluded erroneously that supplying information to federal prosecutors was "associated with his role as an advocate of the County." (*Id.* at 13a).

This flatly contradicts this Court's governing precedents defining the "advocacy" function for immunity purposes. See, e.g., *Buckley v. Fitzimmons,* 509 U.S. 259, 274 (1993) (even criminal prosecutors handling a case are not absolutely immune from a charge of fabricating evidence during the pre-trial indictment stage); *Kalina v. Fletcher*, 522 U.S. 118, 130-31 (1997) (a deputy prosecutor charged with making false statements of fact in support of an application for an arrest warrant is not absolutely immune); *Burns v. Reed*, 500 U.S. 478, 493 (1991) (a prosecutor advising the police in the investigative phase of a criminal case is not absolutely immune).

In such cases, this Court has drawn a sharp distinction between "advocacy" functions (e.g., preparing for trial, evaluating evidence, trying the case) which are absolutely immune and "investigatory" functions aimed at determining whether probable cause exists to take some action, which are not absolutely immune. This case falls into the latter category. Bass, who was not even a prosecutor, presented evidence to prosecutors during the course of their investigation to determine probable cause.

The district court and the appeal panel failed to draw the distinction that this Court directs. Bass was simply a complaining witness here, a functional category which this Court has expressly ruled out for absolute immunity purposes. See *Malley v. Briggs*, 475 U.S. 335, 340-41 (1986) (absolute

immunity does not extend to "complaining witnesses," those whose allegations serve to bring about a prosecution).

On appeal, the defense ignored these controlling decisions and, instead, directed the panel's attention to another decision of this Court, *Butz v. Econonomou* 438 U.S. 478 (1978). *Butz* is perfectly consistent with the decisions cited above. *Butz* holds that government attorneys and executive officials on the "advocacy" side of the line (i.e., performing prosecutorial functions or deciding to initiate litigation) are entitled to absolute immunity along with prosecutors. This does not help Bass, a complaining witness on the "investigatory" side of the line.

If allowed to stand, the panel decision in this case will establish a conflict between the 11th Circuit and the circuits who follow this Court's instructions.

CONCLUSION

The Court should grant a writ of certiorari to review the lower court decision *de novo* and reverse the dismissal of Grigsby's Fourth Amendment "continuing seizure" claim. The Court should also grant the writ to review the lower court's grant of absolute immunity to Bass and reverse that decision.

DATED: July 26, 2004

Respectfully submitted:

LARRY A. STUMPF,
Counsel of Record
Black, Srebnick, Kornspan
& Stumpf, P.A.

201 South Biscayne Blvd.,
Suite 1300
Miami, FL 33131
TEL: 305 371-6421
FAX: 305 371-6322

WILLIAM P. TEDARDS, JR.
1101 30th Street, N.W.,
Suite 500
Washington, D.C. 20007
TEL: 202 797-9135
FAX: 202 797-9139

Counsel for Petitioner
Calvin Grigsby

Supreme Court, U.S.
FILED
JUL 26 2004
OFFICE OF THE CLERK

No. 04-134

IN THE
SUPREME COURT OF THE UNITED STATES

CALVIN GRIGSBY,

Petitioner,

v.

MIAMI-DADE COUNTY, FLORIDA, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

SEPARATE APPENDIX TO PETITION FOR WRIT OF CERTIORARI

WILLIAM P. TEDARDS, JR.
1101 30TH Street, N.W.,
Suite 500
Washington, D.C. 20007
TEL: (202) 797-9135

LARRY A. STUMPF
Counsel of Record
Black, Srebnick, Kornspan & Stumpf, P.A.
201 South Biscayne Blvd.,
Suite 1300
Miami, FL 33131
TEL: (305) 371-6421

July 26, 2004

Counsel for Petitioner

TABLE OF CONTENTS

APPENDIX A 1a

APPENDIX B 4a

APPENDIX C 25a

APPENDIX D 44a

APPENDIX E 64a

APPENDIX F 67a

APPENDIX G 70a

APPENDIX H 71a

APPENDIX I 72a

APPENDIX J 73a

APPENDIX K 75a

APPENDIX A

United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

Fiscal Operations, Inc., and Calvin Grigsby, *Plaintiffs-Appellants,* V. Miami-Dade County, Florida, et al., *Defendant,* Alex Penelas; Steven B. Bass; Kathy Jackson; Miriam Alonso; and Rachel Baum. *Defendants-Appellees.*	)	No. 03-12576 D.C. No. 01-04798-CV-DLG

Fiscal Operations, Inc., and Calvin Grigsby, *Plaintiffs-Appellants,* V. Miami-Dade County, Florida, *Defendant-Appellee,*	)	No. 03-12577 D.C. No. 01-04798-CV-DLG

Alex Penelas, et al.,	)	
	)	
Defendants.	)	

Fiscal Operations, Inc., and Calvin Grigsby,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
V.	)	No. 03-12578
	)	
Miami-Dade County, Florida, et al.;	)	D.C. No. 01-04798-CV-DLG
	)	
Defendants,	)	
	)	
Deloitte & Touche, L.L.P.,	)	
	)	
Defendant-Appellee.	)	

Appeals from the United States District Court
for the Southern District of Florida

(March 2, 2004)

Before: TJOFLAT, BARKETT and SILER*, Circuit Judges.

PER CURIAM:

AFFIRMED. See 11th Cir. Rule 36-1.[1]

*Honorable Eugene E. Siler, Jr., United States Judge for the Sixth Circuit, sitting by designation.

---

1 11th Cir. R. 36-1 provides:
When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B

United States District Court
Southern District of Florida
Miami Division

Fiscal Operations, Inc., and Calvin Grigsby,	)	
Plaintiffs-Appellants,	)	
V.	)	Case No. 01-04798-CIV-Graham/Garber
Miami-Dade County, Florida; Alex Penelas; Steven B. Bass; Kathy Jackson; Miriam Alonso; Rachel Baum; and Deloitte and Touche, L.L.P.	)	
Defendants-Appellees.	)	

ORDER

THIS CAUSE came before the Court upon Defendants Alex Penelas, Steven B. Bass, Kathy Jackson, Miriam Alonso, and Rachel Baum's Motions to Dismiss First Amended Complaint, [D.E. 41 and D.E. 118].

THE COURT has reviewed the Motions, the pertinent portions of the record, and is otherwise fully advised in the premises.

INTRODUCTION

Fiscal Operations, Inc., ("Fiscal") and its President and Chief Executive Officer, Calvin Grigsby ("Grigsby") filed this action against Defendants Miami-Dade County (the "County"), Mayor Alex Penelas ("Penelas"), Assistant County Attorney Steven B. Bass ("Bass"), County Auditor Kathy Jackson ("Jackson"), Commissioner Miriam Alonso ("Alonso"), Finance Department Director Rachel Baum ("Baum"), and Deloitte & Touche ("Deloitte") based upon Defendants' alleged participation in the wrongful termination of a franchise agreement between the County and Fiscal (the "franchise agreement"). The Complaint also alleges the wrongful taking of property in the form of Plaintiffs' contractual rights, the wrongful seizure of Plaintiffs' business assets and the procurement of false information to federal authorities, resulting in Plaintiff Grigsby's arrest and prosecution for the theft of public funds.

PROCEDURAL BACKGROUND

Plaintiffs filed their Original Complaint on November 26, 2001, and alleged Denial of Due Process (Count 1), Taking Without Just Compensation (Count II), Denial of Due Process (Count III), Unreasonable Seizure and Restraint (Count IV), and Conspiracy (Count V). On February 20, 2002, Plaintiffs filed their Amended Complaint and alleged two additional causes of action: Accountants' Fraud (Count VI) and Malicious Prosecution (Count VII).

On December 17, 2001, Defendants Penelas, Bass and Jackson filed a motion to dismiss the Original Complaint. On March 4, 2002, Defendants Penelas, Bass and Jacksin, along with Defendants Alonso and Baum, filed a motion to dismiss the Amended Complaint. The motion to dismiss asserts that 1) Defendants are entitled to absolute immunity from the claims

alleged; 2) they are entitled to qualified immunity; 3) this action is barred by Rooker-Feldman doctrine because the same claims were raised or could have been raised in a related state proceeding; 4) the Court should dismiss the action pursuant to the Colorado River doctrine because the same issues are already being considered in a state claim that has been pending for more than four years; 5) the Complaint fails to state a claim for unlawful taking because the deprivation of contractual rights does not constitute a taking of property; and 6) the Complaint fails a claim for a conspiracy because it fails to state a claim for any underlying constitutional violation.

FACTUAL BACKGROUND

According to the Complaint, in 1982, Plaintiff Fiscal entered into a franchise agreement with the County to manage and operate gantry cranes at the Port of Miami (the "Port"). Pursuant to the agreement, Fiscal maintained and operated the cranes, renting the cranes on an hourly fee basis to the stevedoring companies that loaded and unloaded cargo ships that docked at the Port. Fiscal sent bills to the stevedoring companies for the hourly crane rental fees ("crane user fees"). The Complaint alleges that until the events giving rise to the lawsuit, the stevedores paid the crane user fees directly to Fiscal. Also, it is alleged that the County, Deloitte, the Port, Fiscal, the Internal Revenue Service and all others involved threatened the crane users fees as the property of Fiscal, rather than the County's.

According to the Complaint, however, between 1996 and 1998, the County, Penelas, Bass, Jackson, Alonso, Baum, Deloitte, and others orchestrated a course of action that was specifically designed and intended to, and did: a) create and utilize a fabricated pretext to unlawfully terminate the franchise agreement; b) seize, by physical force and with no judicial or other lawful process, all of the personal property of Fiscal used

by Fiscal in the operation of its business; and c) create and utilize fabricated evidence to instigate a capricious prosecution of, and the attendant seizure of, Grigsby. Plaintiffs allege that Penelas directed Bass and Jackson to fabricate evidence that could be used to argue that Fiscal was a department or agent of the County and that the gantry crane user fees that Fiscal collected were County funds. Plaintiffs also allege that the Defendants caused Defendant Deloitte to retroactively alter some of its audit reports of the Port to make them consistent with this false recharacterization of the County and Fiscal's longstanding relationship and treatment of the crane user fees, with no accounting justification for the material change. Plaintiffs claim that this conduct by the individual Defendants constitutes executive, not legislative functions.

County and Deloitte Audits

According to the Complaint, on November 18, 1996, Defendant Penelas directed the County Manager to obtain a special audit of Fiscal's business. The responsibility for the audit was passed to Jackson, then acting Director of the County's Audit and Management Services Department. In furtherance of obtaining the audit and acting on Penelas' order, Jackson, with the assistance of Bass, Baum, Deloitte and others, began in December 1996 to demand every accounting and financial document that Fiscal had ever generated. Additionally, the County filed in February 1997, a Public Records Act action (Metropolitan Dade County v. Fiscal, 11th Judicial Circuit, Dade County, Case No. 97-04449 CA 32) against Fiscal, seeking to have Fiscal declared to be "a public agency." The County's audit of Fiscal was completed in January of 1998.

Additionally, the Complaint alleges that at the direction of Penelas, Bass and Jackson encouraged Deloitte to revisit its interpretation of the franchise agreement. On February 20,

1998, Deloitte issued its audit report of the Port for fiscal year 1996 and restated the Port's 1995 financial statements. The restated audit report treated the crane user fees as "County Money." The audit report also changed, from $2,400 to in excess of $6 million, the amount of federal funds received by the Port in 1995. According to the Complaint, these same altered accounting treatments were also applied to the 1996 financials of the Port.

The County Resolution and the Contract Termination

On April 21, 1998, the County Manager was given a resolution to present to the Board, approving the termination of the franchise agreement. According to the Complaint, the resolution was prepared by Bass and Jackson and was sponsored and placed on the Commission agenda by Alonso. Additionally, Defendant Bass approved as to the form and legal sufficiency of the resolution.

The resolution referred to Jackson's January 16, 1998 audit report as having "found, among other things, 'mismanagement of the County's gantry crane operation, wasteful and abusive spending practices, [and] undocumented and unauthorized transactions....'" The resolution also stated "it is believed that Fiscal is currently retaining hundreds of thousands of collected user fees belonging to the County, in violation of contract requirements." Noting Jackson's recommendation that the County assume control of the crane operation "as soon as practical," the resolution directed the County Manager to do so. To support the resolution, the County Manager was also given a memorandum, prepared by Bass and Jackson, recommending approval of the resolution to terminate the franchise agreement. According to the Complaint, that memorandum contained several material misrepresentations, assertedly designed to support the Defendants' theft of "Public Funds" theory. The County

Commissioners subsequently passed the resolution and in the Spring of 1998, the County issued a notice of default and terminated the franchise agreement.

On May 18, 1998, acting in accordance with Jackson's statement that "the County should take immediate control of the operation," the County physically seized Fiscal's entire business, including the personal property and other assets of Fiscal, and began, according to the Complaint, to run the business for its own benefit. Based upon the information obtained from the audits and the Public Records Act action, Jackson and Bass presented the Federal Bureau of Investigation (the "FBI") and representatives of the United States Attorney's Office with evidence that Grigsby had used "County Money" and "Public Funds" to make unauthorized expenditures not directly related to crane operations. Plaintiffs deny stealing County funds and charge Defendants with fabricating the evidence.

DISCUSSION

Standard of Review

A complaint should not be dismissed "for failure to state a claim unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts" that would entitle the plaintiff to relief. Conley v. Gibson, 355 U.S. 41, 45 (1957); Bracewell v. Nicholson Air Services, Inc., 680 F.2d 103, 104 (11th Cir. 1982). In deciding a motion to dismiss, a court can only examine the four corners of the complaint. See Crowell v. Morgan Stanley Dean Witter Services, Co., Inc., 87 F.Supp. 2d 1287 (S.D. Fla. 2000). Additionally, a court must accept a plaintiff's well pled facts as true and construe the complaint in the light most favorable to plaintiff. Scheuer v. Rhodes, 416 U.S. 232 (1974). The threshold of sufficiency that a complaint

must meet is exceedingly low. Ancata v. Prison Health Servs. Inc., 769 F.2d 700, 703 (11th Cir. 1985); Geidel v. City of Bradenton Beach, 56 F.Supp.2d 1359, 1362 (M.D. Fla. 1999).

Absolute Immunity Defense

Legislators have absolute immunity under Section 1983 when they are "acting within their legislative roles, 'performing' legislative acts." Brown v. Crawford County, 960 F.2d 1002, 1011 (11th Cir. 1992) (quoting Tower v. Glover, 467 U.S. 914, 920, 104 S.Ct. 2820, 2824, 81 L.Ed.2d 758 (1984)). But, the immunity "extends only to actions taken within the sphere of legitimate legislative activity." Id. (quoting Finch v. City of Vernon, 877 F.2d 1497, 1505 (11th Cir. 1989)). It is the nature of the act, and not the position of the actor, which determines when absolute legislative immunity will apply. See Yeldell v. Cooper Green Hospital, Inc., 956 F.2d 1056, 1062 (11th Cir. 1992). Thus, whether the Defendants are entitled to such immunity depends upon whether when making decisions regarding Plaintiffs and their contract with the County they were acting in their legislative capacity: was terminating the franchise agreement a "legislative act"?

Legislative immunity was established in the Speech and Debate Clause of the United States Constitution. The clause protects not only the speech and debate of legislators, but also voting on legislative acts. See Kilbourn v. Thompson, 103 U.S. 168, 204, 26 L.Ed. 377 (1880). This absolute legislative immunity has been extended by the Supreme Court, beyond federal legislators, to state and regional legislators. See Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 732 100 S.Ct. 1967, 1974, 64 L.Ed.2d 641 (1980); Hernandez v. City of Lafayette, 643 F.2d 1188, 1193 (5th Cir. 1981). Thus, county commissioners can be entitled to legislative immunity when acting in their legislative capacities. Additionally, even if the legislators act out of evil intent, the legislative nature of

the act still controls. See Ellis v. Coffee County Bd. of Registrars, 981 F.2d 1185, 1191 (11th Cir. 1993).

Defendants Alonso and Penelas

Defendants contend that sponsoring and voting for the resolution was, in form, quintessentially legislative and therefore protected by absolute immunity. See e.g. Bogan v. Scott-Harris, 523 U.S. 44, 49 (1998); Fry v. Board of County Com're of County Baca, State of Colo., 7 F.3d 936, 942 (10th Cir. 1990). Defendants, are however, incorrect in their contention. An act is deemed legislative, rather than administrative or managerial, when it is policymaking and of general application. See Brown, 960 F.2d at 1011. "Only those acts which are 'necessary to preserve the integrity of the legislative process' are protected." Yeldell, 956 F.2d at 1062 (quoting United States v. Brewster, 408 U.S. 501, 517, 92 S.Ct. 2531, 2539, 33 L.Ed.2d 507 (1972)). Courts have held that "voting, debate and reacting to public opinion are manifestly in furtherance of legislative duties." DeSisto College, Inc. v. Line, 888 F.2d 755, 765 (11th Cir. 1989).

In Crymes v. DeKalb County, 923 F.2d 1482 (11th Cir. 1991), however, the Eleventh Circuit expressly rejected the argument that the act of voting, in itself, constitutes legislative action giving rise to immunity. It has been held that "[a]lthough a local legislator may vote on an issue, that alone does not necessarily determine that he or she was acting in a legislative capacity." Cinevision Corp. v. City of Burbank, 745 F.2d 560, 580 (9th Cir. 1984), cert. denied, 471 U.S. 1054, 105 S.Ct. 2115, 85 L.Ed.2d 480 (1985). A legislative act involves policymaking rather than mere administrative application of existing policies. Minton v. St. Bernard Parrish School Bd., 803 F.2d 129, 135 (5th Cir. 1986) (citing Hornsby v. Allen, 326 F.2d 605, 608-09 (5th Cir. 1964)). If the facts utilized in making a decision are specific, rather than general, in nature, then the

decision is more likely administrative. Moreover, if the decision impacts specific individuals, rather than the general population, it is more apt to be administrative in nature. See Cutting v. Muzzey, 724 F.2d 259, 261 (1st Cir. 1984).

The vote on the resolution to terminate Fiscal's franchise agreement was specific, and not general. Moreover, the termination of the agreement specifically impacted Fiscal and Grigsby. Accordingly, the court is unable to grant absolute immunity to the Defendant Alonso in relation to the drafting and voting of the resolution. Additionally, the Court is unable to grant absolute immunity to Defendant Penelas in relation to enforcing and upholding the resolution. Defendants' motion to dismiss based upon absolute immunity must therefore be denied as it relates to Defendants Alonso and Penelas.

Defendant Bass

Courts have consistently granted civil government attorneys the same absolute immunity provided to criminal prosecutors. See Butz v. Economou, 438 U.S. 478, 512, 98 S.Ct. 2894, 2914, 57 L.Ed.2d 895 (1978). In Mitchell v. Forsyth, 472 U.S. 511, 520-524, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), the Supreme Court discussed three factors that courts should evaluate when determining whether to give a government official absolute immunity for a particular function. The court should ask (1) whether a historical or common law basis exists for immunity from suit arising out of performance of the function; (2) whether performance of the function poses obvious risks of harassing or vexatious litigation against the official; and (3) whether alternatives to bringing a damage suit against the official could redress the wrongful conduct. Executive officials and agency attorneys who initiate administrative proceedings on behalf of the government meet this test. See Butz at 512-17, 98 S.Ct. 2894. In granting absolute immunity to these officials, the Supreme Court

reasoned that attorneys who initiate criminal prosecutions and agency proceedings are entitled to absolute immunity because otherwise they "might hesitate to bring forward some witnesses or documents" for fear of personal liability. Id. at 517, 98 S.Ct. 2894. Additionally, a prosecutor is absolutely immune from suit for malicious prosecution. Mallery v. Briggs, 475 U.S. 342-43, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). Prosecutors also enjoy absolute immunity from allegations stemming from the prosecutor's function as advocate. Buckley v. Fitzsimmons, 509 U.S. 273, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993). Such absolute immunity extends to a prosecutor's "acts undertaken ... in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State." Buckley, 509 U.S. at 273, 113 S.Ct. 2606; Mastroianni v. Bowers, 173 F.3d 1363 (11th Cir. 1999).

According to the Complaint, in preparation for initiation of the judicial proceedings against Fiscal, Assistant County Attorney Bass, on the direction of Penelas, demanded every accounting and financial document generated by Fiscal. Plaintiffs allege that Bass also prepared and approved as to form and legal sufficiency the resolution approving the termination of the Fiscal contract. Finally, Plaintiffs allege that Bass presented the Federal Bureau of Investigation and representatives of the U.S. Attorney's Office with evidence that Grigsby used County money and public funds to make unauthorized expenditures not directly related to crane operations. Plaintiffs have failed to demonstrate that Bass was not performing functions that were not associated with his role as an advocate of the County. Accordingly, Plaintiffs' Complaint as it pertains to County Attorney Bass, must be dismissed.

Defendants Baum and Jackson

The Complaint alleges that Finance Department Director Baum encouraged the County's auditor, Deloitte, to revisit its interpretation of the Fiscal contract. Additionally, the Plaintiffs accuse County Auditor Jackson of auditing Fiscal's contract with the County, publishing the results and joining in a recommendation to pursue litigation. As these actions are clearly not legislative in nature, Defendants Baum and Jackson are not entitled to absolute immunity.

Qualified Immunity Defense

The defense of qualified immunity completely protects government officials performing discretionary functions from suit in their individual capacities unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Hope v. Pelzer, 536 U.S. 730, 122 S.Ct. 2508, 2515, 153 L.Ed.2d 666 (2002) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)). "The purpose of this immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from suit all but the plainly incompetent or one who is knowingly violating the federal law." Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002) (internal citation and quotation omitted). Because qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation," Mitchell v. Forsyth, 472 U.S. 510, 526, 105 S.Ct. at 2806, 2815, 86 L.Ed.2d 411 (1995), questions of qualified immunity must be resolved "at the earliest possible stage in litigation." Hunter v. Bryant, 502 U.S. 224, 227, 112 S.Ct. 534, 536, 116 L.Ed.2d 589 (1991) (per curiam). It is therefore appropriate for a district court to grant the defense of qualified immunity at the motion to dismiss stage if the complaint "fails to allege the violation of a clearly established

constitutional right." Chesser v. Sparks, 248 F.3d 1117, 1121 (11th Cir. 2001) (quoting Williams v. Ala. State Univ., 102 F.3d 1179, 1182 (11th Cir. 1997)).

In considering whether qualified immunity applies, the defendants must first show that they were acting within the scope of their discretionary authority when the wrongful conduct occurred. Jackson v. Sauls, 206 F.3d 1156, 1164 (11th Cir. 2000). Once a defendant demonstrates that he or she was acting within his or her discretionary authority, the burden then shifts to plaintiff to demonstrate that qualified immunity is not appropriate. Vinyard v. Wilson, 311 F.3d 1340, 1346 (11th Cir. 2002).

In Saucier v. Katz, the Supreme Court set forth a two-part test for evaluating a claim of qualified immunity. As a "threshold question," a court must ask, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the (defendant's) conduct violated a constitutional right?" Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001). If a constitutional right would have been violated under Plaintiff's version of the facts, the court must then determine "whether the right was clearly established." Id. The burden is on the Plaintiff to demonstrate that, based on the alleged facts, clearly established law has been violated. Brown v. Cochran, 171 F.3d 1329, 1332 (11th Cir. 1999). In this regard, the Supreme Court recently explained: For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful but it is to say that in the light of pre-existing law, the unlawfulness must be apparent. See Hope v. Pelzer, 122 S.Ct. 2508, 2515 (June 27, 2002) (citations omitted). Thus, the Court explains that in order to overcome Defendants' qualified

immunity, it must be shown that existing law at the time of the conduct in question provided Defendants with "fair warning" that their conduct violated clearly established law. See Id., 122 S.Ct. at 2515-2516.

In examining the factual allegations in the complaint, the court must keep in mind the heightened pleading requirements for civil rights cases, especially those involving the defense of qualified immunity. GJR Investments, Inc. v. County of Escambia, 132 F.3d 1359, 1367 (11th Cir. 1998). The complaint must allege the relevant facts "with some specificity." Id. More than mere conclusory notice pleading is required. "[A] complaint will be dismissed as insufficient where the allegations it contains are vague and conclusory." Fullman v. Graddick, 739 F.2d 553, 556-57 (11th Cir. 1984). See also Veney v. Hogan, 70 F.3d 917, 922 (6th Cir. 1995) (holding that complaint must "include the specific, non-conclusory allegations of fact that will enable the district court to determine that those facts, is proved, will overcome the defense of qualified immunity"). Moreover, in reviewing a motion to dismiss, the court need only accept "well-pleaded facts" and "reasonable inference drawn from those facts." Oladeinde v. City of Birmingham, 963 F.2d 1481, 1485 (11th Cir. 1992). "[U]nsupported conclusions of law or of mixed fact and law have long been recognized not to prevent a Rule 12(b)(6) dismissal." Marsh v. Butler County, 268 F.3d 1014, 1036 (11th Cir. 2001). The Court must also keep in mind the fact that "[w]e generally accord ... official conduct a presumption of legitimacy." United States Dep't of State v. Ray, 502 U.S. 164, 179, 112 S.Ct. 541, 550, 116 L.Ed.2d 526 (1991).

The Court now turns to the Complaint to determine whether Plaintiffs have stated claims sufficient to establish § 1983 violations.

Count I - Denial of Due Process

Count I of the Complaint, Plaintiffs contend that they possessed a property right in the franchise agreement which was "expropriated by arbitrary and capricious means." Plaintiffs do not contend that they possessed a liberty interest in their contract with the county but rather, that the contract was "property" within the meaning of the Fourteenth Amendment. This assertion is incorrect as a matter of law. The Supreme Court in Logan v. Zimmerman Brush, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), provided useful guidance for determining what interests constitute "property" as envisioned by the Fourteenth Amendment. In that case the Court remarked that "[t]he hallmark of property ... is an individual entitlement grounded in state law, which cannot be removed except 'for cause'." Id. at 430, 102 S.Ct. at 1155. See also, Board of Regents v. Roth, 408 U.S. 564, 576-78, 92 S.Ct. 2701, 2708-10, 33 L.Ed.2d 548 (1972) (no property interest in having contract renewed where previous contract did not require renewal absent sufficient cause). Under this test Plaintiffs did not possess a property interest in their contract with the County. Because Plaintiffs have failed to demonstrate that Defendants' conduct violated a clearly established constitutional right, the Defendants' motion to dismiss Count I of the Complaint must be granted.

Count II - Taking Without Compensation

Count II of the Complaint alleges that Fiscal's personal property was improperly seized without compensation. Specifically, the Complaint alleges that "Defendants denied Fiscal's management access to Fiscal's own secure, fenced work area, using posted armed security guards to prevent access. Defendants then took possession of Fiscal's procedure manuals, appropriated Fiscal's business methods, and began

using over $1,000,000 worth of Fiscal's tools, spare parts and equipment, without any compensation to Fiscal."

The Takings Clause of the Fifth Amendment of the U.S. Constitution provides: "nor shall private property be taken for public use, without just compensation." Villas of Lake Jackson v. Leon County, 121 F.3d 610, 614 (11th Cir. 1997); The Reserve, Ltd. v. Town of Longboat Key, 17 F.3d 1374, 1379-80 (11th Cir. 1994); the only substantive due process claim is for "arbitrary and capricious" taking of property. A substantive due process analysis, within the deprivation of a property interest context, involves two queries: "1) was the plaintiff deprived of a constitutionally protectible property interest? and 2) assuming a property interest, was the deprivation of that property interest for an improper motive and be means that were pretextual, arbitrary and capricious and without any rational basis?" The Reserve, Ltd. at 1379 (11th Cir. 1994).

Plaintiffs claim that the Defendants deprived them of access to their property, constituting a taking without due process in violation of the Fifth Amendment. In Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), the Supreme Court held that a property owner must exhaust state procedures for obtaining just compensation, including resort to a state inverse condemnation action, before bringing a "taking" claim under 42 U.S.C. 1983. Id., 105 S.Ct. at 3121-22. The Court reasoned that the Fifth Amendment does not prohibit takings, only uncompensated takings. "[B]ecause the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not 'complete' until the State fails to provide adequate compensation for the taking." Id. at 3121. Thus, "if a State provides an adequate remedy for seeking just compensation, the property owner cannot claim a violation of the Just

Compensation Clause until it has used the procedure and been denied just compensation." Id. at 3121. Florida law provides compensation for deprivation or impairment of the right of access, Anhoco Corp. v. Dade County, 144 So.2d 793 (Fla. 1962), which may be enforced in an action for inverse condemnation. See, e.g., Pinellas County v. Austin, 323 So.2d 6 (Fla. Dist. Ct. App. 1975). As Plaintiffs have not shown that the Florida procedures were unavailable or inadequate; until they have utilized those procedures, their takings claim is premature. Plaintiffs have failed to sufficiently allege any argument in support of their claim for denial of due process and accordingly, Defendants' motion to dismiss as it related to Count II of the Complaint must be granted.

Counts III and IV - Denial of Due Process and Unreasonable Seizure

Count III alleges that "Defendants, with the assistance of Deloitte and others, fabricated evidence to the effect that Grigsby had stolen 'Public Funds' and used that fabricated evidence to deceive federal prosecutors into initiating a grand jury proceeding (where the jurors were similarly deceived) and a subsequent prosecution." Count IV alleges that "using deliberately fabricated evidence, Defendants deceived the prosecutor into believing that probable cause existed and proximately caused the deception of the grand jury, the initiation of a prosecution that was not backed by probable cause, and an unlawful seizure and restraint of Grigsby." Plaintiffs argue that § 1983 provides a remedy against a public official's use of "false evidence" to support a criminal prosecution.

Undertaking the first step of the two-step qualified immunity inquiry, the Court is persuaded that there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was

deliberately fabricated by the government. Perhaps because the proposition is virtually self-evident, the Court is not aware of any prior cases that have expressly recognized this specific right, but that does not mean that there is no such right. Rather, what is required is that government officials have "fair and clear warning" that their conduct is unlawful. See United States v. Lanier, 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) (quoting Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

The second step of the qualified immunity analysis requires a determination of whether the Defendants' conduct violated a constitutional right. Plaintiffs point to cases that stand for the general propositions of law that it is unlawful to pursue a criminal conviction on the basis of "false evidence." The relevant question in this case is, however, not whether it is unlawful to use false evidence, but whether it was clearly established that an erroneous interpretation of a contract like that alleged here constitutes "false evidence." The Plaintiffs' vague and conclusory allegations of fabricated evidence do not establish § 1983 liability. Plaintiffs make bold statements and legal conclusions without alleging any specific facts to support them. Plaintiffs do not sufficiently allege any misrepresentations made by Defendants, but merely label the Defendants' interpretation of the franchise agreement as it relates to the determination of the crane user fees as county funds and Fiscal as a county agency as "false evidence."

Plaintiffs claim that there is a casual connection between the Defendants' interpretation of the contract and subsequent submission of evidence to prosecutorial authorities and Grigsby's subsequent prosecution, but they do not allege any facts to support this connection. Specifically, Plaintiffs do not allege that the Defendants directed the FBI or the U.S. Attorneys' Office to conduct the investigation or to pursue the subsequent prosecution of Grigsby. Moreover, Plaintiffs have

failed to demonstrate that it was the Defendants' reading of the contract and not that of the FBI, the federal prosecutors and the grand jury that led to Grigsby's arrest and prosecution.

Additionally, any causal connection that may have existed between the Defendants' statements to prosecutorial authorities about the franchise agreement and Grigsby's subsequent indictment was severed by the intervening, free, independent and volitional acts of the FBI, the U.S. Attorneys' Office and the grand jury. See Barts v. Joyner, 865 F.2d 1187, 1195 (11th Cir. 1989); Jones v. Cannon, 174 F.3d 1271, 1287 (11th Cir. 1999); Dixon v. Burke County, Ga., 303 F.3d 1271 (11th Cir. 2002). Plaintiffs argue that these cases do not apply if the "plaintiff can show that these intervening acts were the result of deception or undue pressure by the Defendant." Plaintiffs, have, however, failed to allege any facts that demonstrate that the Defendants had the ability to and did mislead or unduly influence the FBI, the U.S. Attorneys' office or the grand jury.

Finally, Plaintiffs cite no cases that would have put the Defendants on notice that "in light of pre-existing law" their conduct was forbidden. Quite the contrary, the law actually encourages officials to do what these Defendants allegedly did - interpret public documents, investigate the expenditure of funds to the public, report their findings to the appropriate authorities for consideration for prosecution and institute civil litigation to recover any funds that the public may be due. In sum, Plaintiffs allege that the Defendants deceived prosecutors in violation of their Fourth and Fourteenth Amendment rights, but they fail to allege any facts which, if true, that would establish that the Defendants caused any such violation. Because Plaintiffs have failed to allege that the Defendants' conduct constituted a constitutional violation, the Defendants are entitled to qualified immunity as to Counts III and IV of the Complaint.

Count V - Conspiracy

Count V of the Complaint alleges that "Defendants *conspired with Deloitte, Alonso, Baum and possibly others, to* deprive Fiscal and Grigsby of their Constitutional rights by fabricating false evidence and then using the fabricated evidence to confiscate Fiscal's business and property in violation of the Fourth and Fourteenth Amendments, and to instigate a capricious indictment, prosecution and seizure of Grigsby in violation of the Fourth, Fifth and Fourteenth Amendments."

Conspiring to violate another person's constitutional rights violates Section 1983. Dennis v. Sparks, 449 U.S. 24, 27, 101 S.Ct. 183, 186 (1980). To establish a prima facie case of Section 1983 conspiracy, a plaintiff must show, among other things, that the defendants "reached an understanding to violate his rights." Rowe v. Fort Lauderdale, 279 F.3d 1271 (11th Cir. 2002) quoting Strength v. Hubert, 854 F.2d 421, 425 (11th Cir. 1988). The plaintiff does not have to produce a "smoking gun" to establish the "understanding" or "willful participation" required to show a conspiracy, but must show some evidence of agreement between the defendants. Id. at 1284. To sustain a conspiracy action under § 1983 a plaintiff must show an underlying actual denial of its constitutional rights. See Slavin v. Curry, 574 F.2d 1256, 1262 (5th Cir. 1978); modified on denial of r'hrg, 583 F.2d 779 (5th Cir. 1978), Strength v. Hubert, 854 F.2d 425, 421 (11th Cir. 1988) (stating theoretical basis of and requirements for stating a claim under § 1983 of conspiracy to violate constitutional rights).

As stated above, Plaintiffs' Complaint does not sufficiently allege denial of any of their constitutional rights. Moreover, the Complaint fails to make any particularized

allegations that a conspiracy existed, another prerequisite of a § 1983 conspiracy claim. See Phillips v. Mashburn, 746 F.2d 782, 784 (11th Cir. 1984). Finally, Plaintiffs have failed to sufficiently allege that the Defendants were aware of a conspiracy, much less that they agreed to participate in one. As the Court can find no sufficiently pled federal claims in the Complaint that could serve to abrogate Defendants' qualified immunity, it follows that the Defendants' motion to dismiss must be granted as to Count V.

Supplemental Jurisdiction

A district court has discretion to decline to exercise supplemental jurisdiction over state law claims when: 1) the claim raises a novel or complex issue of State law; 2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction; 3) the district court has dismissed all claims over which it has original jurisdiction; or 4) in exceptional circumstances, there are other compelling reasons for declining jurisdictions. 28 U.S.C. § 136(c); Rowe v. Fort Lauderdale, 279 F.3d 1271 (11th Cir. 2002). The Court may decline to exercise jurisdiction over state-law claims, where the Court has dismissed all the federal claims over which it has original jurisdiction. See 28 U.S.C. 1367(c)(3). Having dismissed Plaintiffs' federal claims, the Court declines in its discretion to exercise supplemental jurisdiction over the remaining state-law claims.

CONCLUSION

Based upon the foregoing, it is

ORDERED AND ADJUDGED that Defendants Alex Penelas, Steven B. Bass, Kathy Jackson, Miriam Alonso, and Rachel Baum's Motions to Dismiss First Amended Complaint are **GRANTED** as to Counts I, II, III, IV and V.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of April, 2003.

_____/s/_____
Donald L. Graham
U.S. DISTRICT JUDGE

cc: Magistrate Judge Garber
Counsel of Record

APPENDIX C

United States District Court
Southern District of Florida
Miami Division

Fiscal Operations, Inc., and Calvin Grigsby,	)	
Plaintiffs-Appellants,	)	
V.	)	Case No. 01-04798-CIV-Graham/Garber
Miami-Dade County, Florida; Alex Penelas; Steven B. Bass; Kathy Jackson; Miriam Alonso; Rachel Baum; and Deloitte and Touche, L.L.P.	)	
Defendants-Appellees.	)	

ORDER

THIS CAUSE came before the Court upon Defendant Miami-Dade County's Motion to Dismiss First Amended Complaint, filed March 1, 2002.

THE COURT has reviewed the Motion, the pertinent portions of the record, and is otherwise fully advised in the premises.

INTRODUCTION

Fiscal Operations, Inc., ("Fiscal") and its President and Chief Executive Officer, Calvin Grigsby ("Grigsby") filed this action against Defendants Miami-Dade County (the "County"), Mayor Alex Penelas ("Penelas"), Assistant County Attorney Steven B. Bass ("Bass"), County Auditor Kathy Jackson ("Jackson"), Commissioner Miriam Alonso ("Alonso"), Finance Department Director Rachel Baum ("Baum"), and Deloitte & Touche ("Deloitte") based upon Defendants' alleged participation in the wrongful termination of a franchise agreement between the County and Fiscal (the "franchise agreement"). The Complaint also alleges the wrongful taking of property in the form of Plaintiffs' contractual rights, the wrongful seizure of Plaintiffs' business assets and the procurement of false information to federal authorities, resulting in Plaintiff Grigsby's arrest and prosecution for the theft of public funds.

PROCEDURAL BACKGROUND

Plaintiffs filed their Original Complaint on November 26, 2001, and alleged Denial of Due Process (Count 1), Taking Without Just Compensation (Count II), Denial of Due Process (Count III), Unreasonable Seizure and Restraint (Count IV), and Conspiracy (Count V). On February 20, 2002, Plaintiffs filed their Amended Complaint and alleged two additional causes of action: Accountants' Fraud (Count VI) and Malicious Prosecution (Count VII).

On March 1, 2002, Defendant Miami-Dade filed a motion to dismiss the Amended Complaint. The motion asserts that 1) this actions is barred by Rooker-Feldman doctrine because the same claims were raised or could have been raised in a related state proceeding; 2) the Court should dismiss the

cause pursuant to the Colorado River doctrine because the same issues are already being considered in a state claim that has been pending for more than four years; 3) the Complaint fails to state a claim for unlawful taking because the deprivation of contractual rights does not constitute a taking of property; and 4) the Complaint fails a claim for a conspiracy because it fails to state a claim for any underlying constitutional violation.

FACTUAL BACKGROUND

According to the Complaint, in 1982, Plaintiff Fiscal entered into a franchise agreement with the County to manage and operate gantry cranes at the Port of Miami (the "Port"). Pursuant to the agreement, Fiscal maintained and operated the cranes, renting the cranes on an hourly fee basis to the stevedoring companies that loaded and unloaded cargo ships that docked at the Port. Fiscal sent bills to the stevedoring companies for the hourly crane rental fees ("crane user fees"). The Complaint alleges that until the events giving rise to the lawsuit, the stevedores paid the crane user fees directly to Fiscal. Also, it is alleged that the County, Deloitte, the Port, Fiscal, the Internal Revenue Service and all others involved treated the crane users fees as the property of Fiscal, rather than the County's.

According to the Complaint, however, between 1996 and 1998, the County, Penelas, Bass, Jackson, Alonso, Baum, Deloitte, and others orchestrated a course of action that was specifically designed and intended to, and did: a) create and utilize a fabricated pretext to unlawfully terminate the franchise agreement; b) seize, by physical force and with no judicial or other lawful process, all of the personal property of Fiscal used by Fiscal in the operation of its business; and c) create and utilize fabricated evidence to instigate a capricious prosecution of, and the attendant seizure of, Grigsby. Plaintiffs allege that Penelas directed Bass and Jackson to fabricate evidence that

could be used to argue that Fiscal was a department or agent of the County and that the gantry crane user fees that Fiscal collected were County funds. Plaintiffs also allege that the Defendants caused Defendant Deloitte to retroactively alter some of its audit reports of the Port to make them consistent with this false recharacterization of the County and Fiscal's longstanding relationship and treatment of the crane user fees, with no accounting justification for the material change. Plaintiffs claim that this conduct by the individuals Defendants constitutes executive, not legislative functions.

The Special Audit

On November 18, 1996, Defendant Penelas allegedly directed the County Manager to obtain a special audit of Fiscal's business. The responsibility for the audit was passed to Jackson, then Acting Director of the County's Audit and Management Services Department. Acting assertedly on Penelas' order, Jackson, with the assistance of Bass, Baum, Deloitte and others, began in December 1996 to demand every accounting and financial document that Fiscal had ever generated. Additionally, the County filed in February 1997, a Public Records Act action (Metropolitan Dade County v. Fiscal, 11th Judicial Circuit, Dade County, Case No. 97-04449 CA 32) against Fiscal, seeking to have Fiscal declared to be "a public agency." The County audit was completed by Jackson in January of 1998. Plaintiffs allege that Penelas directed Bass and Jackson to fabricate evidence that could be used to argue that Fiscal was a department or agent of the County and that the gantry crane user fees that Fiscal collected at the Port were County funds. Accordingly, the Complaint alleges, at the direction of Penelas, Bass and Jackson encouraged Deloitte to revisit its interpretation of the franchise agreement.

The Deloitte Audit and Financial Restatements

Pursuant to the franchise agreement, Fiscal maintained and operated the cranes, renting the cranes on an hourly fee basis to the stevedoring companies that loaded and unloaded cargo ships that docked at the Port. Fiscal sent bills to the stevedoring companies for the hourly crane rental fees ("crane user fees"). The Complaint alleges that until the events giving rise to the lawsuit, the stevedores paid the crane user fees directly to Fiscal. Also, the County, Deloitte, the Port, Fiscal, the Internal Revenue Service and all others involved treated the crane user fees as the property of Fiscal, rather than the County's. According to the Complaint, Deloitte's audit reports for many years accurately reflected these financial arrangements and treated the crane user fees as the property of Fiscal. Plaintiffs allege that from 1990 to 1995, the financial statements of the Seaport did not include crane usage within the Seaport's operating revenues. Additionally, Plaintiffs allege that Deloitte and the County specifically knew of certain questionable expenditures made by Fiscal from the crane revenues, later called into question by the County.

Plaintiffs allege that in 1998, the other Defendants caused Deloitte to retroactively alter some of its audit reports of the Port to make them consistent with a false characterization of Fiscal as an County agency and the crane user fees as revenue of the Port. The restated audit report treated the crane user fees as "County Money." Additionally, Deloitte added the phrase "crane usage" to its 1995 list of items included in the Seaport 1995 operating revenues. Deloitte also increased the stated amount of federal funds received by the Port in the Seaport's Restatement of the 1995 financial statements. Plaintiffs allege that these same altered accounting treatments were also applied to the 1996 financials of the Port.

Plaintiffs allege that Deloitte made the changes to the financial statements "for no reason other than to provide a jurisdictional perquisite for the prosecution of Grigsby under 18 U.S.C. § 666." The Complaint alleges that Deloitte capitulated to the other Defendants' request to change its accounting treatment in this arbitrary manner. According to Plaintiffs, but for Deloitte's capitulation, the other Defendants "likely would not have taken the predatory actions which followed shortly thereafter, which depended entirely on the new fabricated assertion that the crane revenues belonged to the County."

Contract Termination and The Resolution

On April 21, 1998, the County Manager was given a resolution to present to the Board, approving the termination of the franchise and the implementing contract. The resolution was sponsored by Alonso, prepared by other Defendants, and approved as to form and legal sufficiency by Bass. The resolution referred to Jackson's January 16, 1998 audit report as having "found, among other things, 'mismanagement of the County's gantry crane operations, wasteful and abusive spending practices, [and] undocumented and unauthorized transactions....'" The resolution also stated "it is believed that Fiscal is currently retaining hundreds of thousands of collected user fees belonging to the County, in violation of contract requirements." Noting Jackson's recommendation that the County assume control of the crane operation "as soon as practical," the resolution directed the County Manager to do so. To support the resolution, the County Manager was also given a memorandum, prepared by the Defendants, recommending approval of the resolution to terminate the Agreement. According to the Complaint, that memorandum contained several material misrepresentations, assertedly designed to support the Defendants' theft of "Public Funds" theory. Subsequently, the County Commissioners passed the resolution. Based upon the results of the County Manager's audit of Fiscal

and the passage of the resolution, in the Spring of 1998, the County issued a notice of default and then terminated the franchise contract. On May 18, 1998, acting in accordance with Jackson's statement that "the County should take immediate control of the operation," the County physically seized Fiscal's entire business, including the personal property and other assets of Fiscal, and began to run the business assertedly for its own benefit.

According to the Complaint, subsequent to the release of the special audit, Jackson and Bass presented the Federal Bureau of Investigation and representative of the United States Attorney's Office with fabricated evidence that Grigsby had used "County Money" and "Public Funds" to make unauthorized expenditures not directly related to crane operations, thereby stealing County funds.

DISCUSSION

Standard of Review

A complaint should not be dismissed "for failure to state a claim unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts" that would entitle the plaintiff to relief. Conley v. Gibson, 355 U.S. 41, 45 (1957); Bracewell v. Nicholson Air Services, Inc., 680 F.2d 103, 104 (11th Cir. 1982). In deciding a motion to dismiss, a court can only examine the four corners of the complaint. See Crowell v. Morgan Stanley Dean Witter Services, Co., Inc., 87 F.Supp. 2d 1287 (S.D. Fla. 2000). Additionally, a court must accept a plaintiff's well pled facts as true and construe the complaint in the light most favorable to plaintiff. Scheuer v. Rhodes, 416 U.S. 232 (1974). The threshold of sufficiency that a complaint must meet is exceedingly low. Ancata v. Prison Health Servs.

Inc., 769 F.2d 700, 703 (11th Cir. 1985); Geidel v. City of Bradenton Beach, 56 F.Supp.2d 1359, 1362 (M.D. Fla. 1999).

Rooker-Feldman Doctrine

The Rooker-Feldman doctrine provides that lower federal courts are barred from reviewing the final judgment of a state's highest court, since review of such a determination is an exercise of appellate jurisdiction, available only in the U.S. Supreme Court. Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923). Thus, U.S. district courts have no jurisdiction over challenges to final state court decisions, even if those challenges allege that the state court's action was unconstitutional. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486, 103 S.Ct. 1303, 1317, 75 L.Ed.2d 206 (1983); Goodman v. Sipas, 259 F.3d 1327 (11th Cir. 2001); Wood v. Orange County, 715 F.2d 1542, 1546 (11th Cir. 1983). The doctrine extends not only to constitutional claims presented or adjudicated by a state court, but also to claims that are "inextricably intertwined" with a state court judgment. Feldman, 460 U.S. at 483; Dale v. Moore, 121 F.3d 624, 626 (11th Cir. 1997). A federal claim is inextricably intertwined with a state court judgment "if the federal claim succeeds only to the extent that the state court wrongly denied the issues before it." Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25, 107 S.Ct. 1519, 1533, 95 L.Ed.2d 1(1987) (Marshall, J., concurring); Blue Cross and Blue Shield of Maryland, Inc. v. Weiner, 868 F.2d 1550, 1554 (11th Cir. 1989). The Rooker-Feldman doctrine applies as long as the party had a reasonable opportunity to raise his federal claims in the state court proceedings. Wood v. Orange County, 715 F.2d 1543, 1547 (11th Cir. 1983). If the party had no reasonable opportunity, the court must find "that the federal claim was not 'inextricably intertwined' with the state court's judgment." Powell v. Powell, 80 F.3d 464, 467 (11th Cir. 1996).

The crucial question in determining the applicability of Rooker-Feldman is whether the relief requested of the federal court would effectively reverse or void the state court's ruling. Olson Farms, Inc. v. Barbosa, 134 F.3d 933, 936 (9th Cir. 1998). If a federal court's decision on an issue requires a determination that the state court was wrong, then the action is properly characterized as an appeal and the federal court cannot hear the case. See Charchenko v. City of Stillwater, 47 F.3d 981, 983 (8th Cir. 1995). "Both the timing of the filing of the federal and state actions, as well as the timing of the ruling in the state case are relevant in deciding whether the federal action should be characterized as an appeal. For example, if the federal action was filed prior to the state action, it cannot be said that the party aggrieved by the state court's ruling. See Doctor's Associates, Inc. v. Distajo, 107 F.3d 126, 138 (2nd Cir. 1997); Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1143 (2nd Cir. 1986) rev'd on other grounds, 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987).

The Eleventh Circuit has explained that the Rooker-Feldman doctrine asks: is the federal plaintiff seeking to set aside a state judgment, or does he present some independent claim, albeit one that denies a legal conclusion that a state court reached in a case to which he was a party? If the latter, then there is jurisdiction and state law determines whether the Defendant prevails under principles of preclusion. Narey v. Dean, 32 F.3d 1521, 1525 (11th Cir. 1994).

Rooker-Feldman and Abstention

As with abstention, much of the justification behind the Rooker-Feldman doctrine is premised on respect for state courts. See Bryant v. Sylvester, 1995 WL 265303 2 (3rd Cir. 1995), vacated on other grounds, 516 U.S. 1105, 116 S.Ct. 899, 133 L.Ed.2d 834 (1996). A second justification for the doctrine is its concern with finality. See Id. at 3. Like res judicata and collateral estoppel, the Rooker-Feldman doctrine is intended to

ensure that litigants do not take multiple bites from the same apple. See Id. Once a litigant's claims have been adjudicated in the state court system, that litigant should not also have access to the entire federal court system. See Id. at 2.

The Rooker-Feldman Doctrine is "at a minimum" coextensive with the principles of res judicata and collateral estoppel. See Doctor's, 107 F.3d at 137 (citing Moccio v. New York State Office of Court Administration, 95 F.3d 195, 199-200 (2nd Cir. 1996)). Thus, litigation in federal court on an issue previously addressed by a state court would be barred under the Rooker-Feldman doctrine if it would be barred by res judicata or collateral estoppel. See Id. The Rooker-Feldman doctrine, however, goes farther than these preclusion doctrines in that it does not require a final judgment before giving preclusive effect to a state court order. Rooker-Feldman also precludes federal courts from reviewing non-final and interlocutory state judgments. "It cannot be the meaning of Rooker-Feldman that while the inferior federal courts are barred from reviewing final decisions of state courts, they are free to review interlocutory orders." Id. Under this reasoning, the Rooker-Feldman doctrine bars a federal court from reviewing the orders of state courts even when res judicata or collateral estoppel would be inapplicable due to the lack of final judgment.

ANALYSIS

With this sketch of the Rooker-Feldman doctrine in mind, the Court turns now to evaluate the doctrine in light of the circumstances presented in the instant case.

Fiscal's State Court Actions

Fiscal's legal dispute with the County began in 1997 when the County filed an action in state court to require Fiscal

to produce its financial books and records pursuant to the terms of the franchise agreement. (Metropolitan Dade County v. Fiscal Operations, Inc., No. 97-04449-CA-32 (Fla. 11th Jud. Cir. Ct.)). As a result of that action, the court ordered Fiscal to produce all of its books and records pertaining to Fiscal's operation of the gantry cranes at the Port.

Based upon the information it obtained through the action, the County filed a second state court action in July 1997 alleging, among other things, breach of contract against Fiscal, Grigsby, and others. (Metropolitan Dade County v. Fiscal Operations, Inc., No. 97-15083-CA-32 (Fla. 11th Jud. Cir. Ct.)). In response to the County's claims, Fiscal counterclaimed for 1) Breach of Contract, 2) Conversion/Breach of Good Faith and Fair Dealing, 3) Tortious Interference, 4) Breach of Settlement Agreement, 5) Violation of 42 U.S.C. § 1983, 6) Public Disclosure of Private Acts, and 7) Declaratory Judgment. During the course of the state action, Fiscal moved to enjoin the County from terminating the franchise agreement. That motion was denied on March 24, 1998. Subsequently, the court dismissed with prejudice Fiscal's counterclaim under § 1983. In April 1998, Fiscal filed an emergency motion to enjoin the County from terminating Fiscal's right to control and manage the gantry cranes at the Port. That motion was also denied, and the Third District Court of Appeals affirmed on May 28, 1998.

After the County terminated the franchise agreement on May 18, 1998, Fiscal instituted a separate statutory action against the county for forcible entry and unlawful retainer. (Fiscal Operations, Inc. v. Miami-Dade County, 735 So.2d 598 (Fla. 3rd DCA 1999)). The circuit court granted summary judgment in favor of the County on this claim and the Third District Court of Appeals affirmed.

Fiscal then filed a Third Amended Counterclaim in the state court breach of contract action, asserting twelve separate

counts, including a claim under § 1983. The court again dismissed the § 1983 claim with prejudice. Fiscal then moved for partial summary judgment on the pleadings, and sought judgment as a matter of law on, among other things, the County's claim for breach of contract. The Court denied Fiscal's motion for partial summary judgment on the pleadings.

Plaintiffs argue that the Rooker-Feldman doctrine has no application in this case because the doctrine requires a final state judgment and the only rulings in state court are interlocutory and have not ripened into a judgment. Second, Plaintiffs assert that the doctrine presupposes an identity of parties between the state court judgment and subsequent federal litigation not present in this case because Plaintiff Grigsby was not a party to the state claims. Third, Plaintiffs contend that the state courts never adjudicated Fiscal's contract, seizure, or due process claims flowing from the termination of the franchise agreement. Plaintiffs contend that the state courts merely determined that the statutory remedy for forcible entry and detainer would not lie. Further, Plaintiffs contend that it was only during his criminal prosecution that the facts of Defendants' "orchestrated course of action was made evident in cross examination of County and other witnesses."

The Court has reviewed the Rooker-Feldman doctrine along with Plaintiffs' objections to its application in this case and finds that the application of the doctrine is appropriate in this cause.

Final Order Requirement

Plaintiffs argue that the Rooker-Feldman doctrine does not apply to this case because the state action did not result in a final order. Although the issue of whether the Rooker-Feldman doctrine precludes federal review of state interlocutory orders has not been definitively resolved by the Circuits, the

greater weight of authority seems to hold that the doctrine should bar review of final and nonfinal orders alike. See Doctor's, 107 F.3d at 137 (Rooker-Feldman is broader than preclusion doctrines because it does not depend on final judgment); Goetzman v. Agribank, FCB, 91 F.3d 1173, 1177 (8th Cir. 1996); Charchenko, 47 F.3d at 983. This argument, therefore does not preclude the application of the Rooker-Feldman doctrine in this case.

Absolute Identity of Parties

While Fiscal was a party to the state action, Grigsby was not. Plaintiffs contend that the Rooker-Feldman doctrine has never been applied against nonparties and should not be applied in this case. This, however, is not quite accurate. The Court does recognize that some courts have held that the Rooker-Feldman doctrine does not apply to bar a suit in federal court brought by a party that was not a party in the preceding state court action. See, e.g., Bennett v. Yoshina, 140 F.3d 1218, 1223-24 (9th Cir. 1998), cert. denied sub nom.; Citizens for a Constitutional Convention v. Yoshina, 525 U.S. 1103, 119 S.Ct. 868, 142 L.Ed.2d 770 (1999) (mere participation in state case as amici does not invoke the doctrine); United States v. Owens, 54 F.3d 271, 274 (6th Cir. 1995); Valenti, 962 F.2d at 297-98. Other courts, however, have not hesitated to apply Rooker-Feldman against parties who did not participate in the state suit. See T.W. & M.W. v. Brophy, 124 F.3d 893, 898 (7th Cir. 1997); Republic of Paraguay v. Allen, 949 F.Supp. 1269, 1273 (E.D. Va. 1996), aff'd on other grounds, 134 F.3d 622, 628 (4th Cir. 1997) Williams v. Adkinson, 792 F.Supp. 755, 761-63 (M.D. Ala. 1992) aff'd, 987-F.2d 774 (11th Cir. 1993). Additionally, more than one federal appellate judge has expressed the view that the applicability of Rooker-Feldman should not depend on identity of the parties in the state and federal suits, see Bates v. Jones, 131 F.3d 843, 855-57 (9th Cir. 1997) (en banc) (Rymer, J. , concurring); Roe v. Alabama, 43

F.3d 574, 586 (11th Cir. 1995) (Edmonson, J., dissenting (disagreeing with the thought that only absolute identity of parties in state action and federal court action, without regard to state-case parties possibly under control or in privity with federal-case parties, will trigger a Rooker-Feldman bar in federal court)).

The Court is persuaded by the latter approach. Insisting that the parties must be identical, it seems, confuses the Rooker-Feldman doctrine with principles of res judicata. As noted above, these doctrines are not the same. See Hachamovitch v. DeBuono, 159 F.3d 687, 696 (2nd Cir. 1998) (noting that the "Rooker-Feldman doctrine differs from preclusion in certain critical ways"); Charchenko, 47 F.3d at 984-85 (conducting separate analyses and finding claims barred by Rooker-Feldman but not res judicata). Accordingly, the fact that Grigsby was not a party to the state suit is not by itself dispositive. Moreover, Grigsby has failed to demonstrate that he did not have a reasonable opportunity to raise his claims in state court. Additionally, though Grigsby chose not to join in the state court lawsuit, Grigsby's corporation, Fiscal, did. As the President and CEO of Fiscal, not only did Grigsby have a reasonable opportunity to join in the state action, but Grigsby was also arguably in privity. This is enough to bar his claim. See Dudley v. Smith, 504 F.2d 979 (5th Cir. 1974); Union Oil of California Amsco Div. v. Watson, 468 So.2d 349 (Fla. DCA 1985). Accordingly, this argument does not preclude the application of the Rooker-Feldman doctrine in this case.

Exact Identity of Claims

Plaintiffs assert that Rooker-Feldman is inapplicable in this case because the claims made in the state action are not identical to those made in the federal action. Plaintiffs contend that while the state action addressed the parties' breach of contract claims, the "gist of the [federal] claim focuses on the

improper motivation of the Defendants, not on whether they breached the terms of any particular contract." Specifically, Plaintiffs contend that while the state court examined Fiscal's defamation, property right and § 1983 claims, the state court never assumed jurisdiction over the fabricated evidence, conspiracy, and use of armed force, instigation of capricious prosecution or malicious prosecution claims. Plaintiffs argue that only after the trials were concluded in late 1999 were Plaintiffs "cognizant that fabricated evidence was used to secure the indictment to help the County cover up its invasion."

Supreme Court and Eleventh Circuit authority, however, refutes Plaintiffs' assertions. In Feldman, the Supreme Court noted that a district court could not exercise jurisdiction over constitutional claims inextricably intertwined with a state court's judgment simply because the federal plaintiff failed to raise such claim in the state court. Feldman, 460 U.S. at 482, 103 S.Ct. at 1315, 75 L.Ed.2d at 223. Interpreting this broad proposition, the court concluded that the Rooker-Feldman doctrine applies when the federal plaintiff had a reasonable opportunity to raise the federal claim in the state court proceedings. Wood, 715 F.2d at 1546-47. The Rooker-Feldman doctrine therefore does not require an exact identity of the claims. It applies not only to claims that were actually raised in state court, but also to "claims that the litigants did not argue in state court, but were inextricably intertwined with the state court judgment." Dale v. Moore, 121 F.3d 624, 626 (11th Cir. 1997).

The problem then becomes determining the scope of the term "reasonable opportunity." Courts have rendered several relevant decisions. In Wood, for example, the court indicated that a party's ability to raise a claim on appeal constituted a reasonable opportunity to raise the claim. Wood, 715 F.2d at 1548 (district court has jurisdiction only because the federal plaintiff did not have a reasonable opportunity to raise his

claim; he lacked a reasonable opportunity to appeal the judgment, and the opportunity for a post-judgment attack did not substitute for an appeal). In Rolleston v. Eldridge, 848 F.2d 163, 165 (11th Cir. 1988), the court affirmed the district court's dismissal for lack of jurisdiction because the party had the opportunity, and in fact availed *himself of such opportunity*, to raise his federal claims in his state court appeal of a state trial court's decision. See also Hollins v. Wessel, 819 F.2d 1073, 1074 (11th Cir. 1987).

Turning to the federal complaint, the Court notes that the relief sought would, as a practical matter, directly nullify the final judgment of the state district court dismissing Fiscal's claims against the County. This fact alone may be sufficient to decide the case. See Suzanna Sherry, *Judicial Federalism in the Trenches: Rooker-Feldman Doctrine in Action*, 74 Notre Dame L.Rev. 1085, 1099 (1999) (suggesting that Rooker-Feldman applies wherever the federal court "is in effect reviewing the state court judgment even if it is not reviewing the decision"). As in Rolleston, and Hollins, Plaintiffs had the opportunity to assert, and did assert, deprivation of property claims arising from the County's decision to terminate Fiscal's contract at the Port, in state court. Accordingly, the Rooker-Feldman bar applies to Plaintiffs' due process claims. See Key v. Wise, 629 F.2d 1049, 1055 (5th Cir. 1980), cert. denied, 454 U.S. 1103, 102 S.Ct. 682, 70 L.Ed.2d 647 (1981). The Court also finds, however, that even if Plaintiffs were not asking the court to effectively overturn the state court's judgment, the federal claims they state so closely implicate the decision of the state court that the federal suit would be barred anyway. See Feldman, 460 U.S. at 482 n. 16, 103 S.Ct. 1303. In reaching this conclusion, the court addresses two issues that complicate the inquiry.

First, since Rooker-Feldman deprives federal courts of jurisdiction over claims not raised before the state court only

where such claims are inextricably intertwined with the state court judgment, "a claim -- particularly a claim under federal law -- is not precluded if it is 'separable from and collateral to the merits of the state-court judgment.'" Fielder, 188 F.3d at 1034 (quoting Pennzoil, 481 U.S. at 21, 107 S.Ct. 1519 (Brennan, J., concurring)). On its face, Plaintiffs' federal complaint in this case may initially appear to articulate legal claims that are separable from and collateral to those raised before the state court. Indeed, whereas the state court faced a breach of contract claim along with the torts of interference and public disclosure challenge, the federal complaint studiously alters the framing of the claims. Instead, Plaintiffs creatively invoke the Fourth and Fourteenth Amendments, alleging that the County's termination of the franchise agreement, Defendants' demands for Fiscal's accounting and financial documents, and Defendants' disclosure of Fiscal's alleged wrongdoing to prosecutorial authorities and the media, resulted in § 1983 violations.

Ultimately, the Court believes that these arguments do no more than restate the claims for relief that were rejected on the merits by the state court. Although technically the suits may invoke distinct constitutional provisions, as a substantive matter they both challenge the basic fairness of the County's termination of the franchise agreement, the demands made for Fiscal's accounting documents and disclosures by Defendant's regarding Fiscal's alleged misconduct. Thus, the Fourth and Fourteenth Amendment arguments presented to the district court appear to be nothing more than creative attempts to reclothe the failed due process claims in new constitutional garb. The claims made in Count I and II of the federal Complaint are based upon the same allegations of deprivation of Plaintiffs' constitutional rights that Fiscal argued and lost in state court proceedings. The claims in Count III and IV of the federal Complaint are based upon the same allegations of the County's procurement of "false evidence" that Fiscal argued

and lost in state court proceedings. Plaintiffs' addition of the claims made in the federal action therefore are insufficient to preclude a dismissal based upon the Rooker-Feldman doctrine. As such, these arguments present the court with a situation in which a decision favorable to Plaintiffs could "only be predicated upon a conviction that the state court was wrong." Pennzoil, 481 U.S. at 25, 107 S.Ct. 1519 (Marshall, J., concurring). Without commenting on the merits of Plaintiffs' arguments, the court simply reiterates that federal plaintiffs cannot by artful pleading obtain a hearing of disguised state court appeals that would otherwise be subject to a Rooker-Feldman bar. See Fielder, 188 F.3d at 1034; Valenti v. Mitchell, 962 F.2d 288, 296 (3rd Cir. 1992) (party "cannot be allowed to escape Rooker-Feldman by raising a new constitutional theory in federal court").

CONCLUSION

As stated above, the state courts previously considered Fiscal's very similar claims, dismissed with prejudice the § 1983 claims, and granted the County's motion for summary judgment as to the other claims. The Court finds that the claims in the instant action are inextricably intertwined with those in the state action. Accordingly, based upon the Rooker-Feldman doctrine, the Court is unable to consider Plaintiffs' claims against the County and the County's motion to dismiss must be granted. Consequently Fiscal's claims against the County must be dismissed. Based upon the foregoing, it is.

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss is **GRANTED**.

DONE AND ORDERED in chambers at Miami, Florida this 30th day of April, 2003.

/s/
Donald L. Graham
U.S. DISTRICT JUDGE

cc: Magistrate Judge Garber
Counsel of Record

APPENDIX D

United States District Court
Southern District of Florida
Miami Division

Fiscal Operations, Inc., and Calvin Grgisby,	)	
Plaintiffs-Appellants,	)	
V.	)	Case No. 01-04798-CIV-Graham/Garber
Miami-Dade County, Florida; Alex Penelas; Steven B. Bass; Kathy Jackson; Miriam Alonso; Rachel Baum; and Deloitte and Touche, L.L.P.	)	
Defendants-Appellees.	)	

ORDER

THIS CAUSE came before the Court upon Defendant Deloitte & Touche, LLP's Motion to Dismiss First Amended Complaint, filed August 2, 2002.

THE COURT has reviewed the Motion, the pertinent portions of the record, and is otherwise fully advised in the premises.

INTRODUCTION

Fiscal Operations, Inc., ("Fiscal") and its President and Chief Executive Officer, Calvin Grigsby ("Grigsby") filed this action against Defendants Miami-Dade County (the "County"), Mayor Alex Penelas ("Penelas"), Assistant County Attorney Steven B. Bass ("Bass"), County Auditor Kathy Jackson ("Jackson"), Commissioner Miriam Alonso ("Alonso"), Finance Department Director Rachel Baum ("Baum"), and Deloitte & Touche ("Deloitte") based upon Defendants' alleged participation in the wrongful termination of a franchise agreement between the County and Fiscal (the "franchise agreement"). The Complaint also alleges the wrongful taking of property in the form of Plaintiffs' contractual rights, the wrongful seizure of Plaintiffs' business assets and the procurement of false information to federal authorities, resulting in Plaintiff Grigsby's arrest and prosecution for the theft of public funds.

PROCEDURAL BACKGROUND

Plaintiffs filed their Original Complaint on November 26, 2001, and alleged Denial of Due Process (Count 1), Taking Without Just Compensation (Count II), Denial of Due Process (Count III), Unreasonable Seizure and Restraint (Count IV), and Conspiracy (Count V). On February 20, 2002, Plaintiffs filed their Amended Complaint and alleged two additional causes of action: Accountants' Fraud (Count VI) and Malicious Prosecution (Count VII).

On August 2, 2002, Deloitte filed its motion to dismiss the Amended Complaint and asserts that 1) the Complaint fails to state a cause of action against Deloitte under 42 U.S.C. § 1983, 2) the Complaint fails to plead the claim of Accountants' Fraus with particularity, and 3) the Complaint fails to state a

cause of action against Deloitte for malicious prosecution. For the reasons discussed herein, the Defendant Deloitte's motion to dismiss under Rules 12(b)(6) and 9(b) is granted.

FACTUAL BACKGROUND

According to the Complaint, in 1982, Plaintiff Fiscal entered into a franchise agreement with the County to manage and operate gantry cranes at the Port of Miami (the "Port"), a County facility. According to the Complaint between 1996 and 1998, the County, Penelas, Bass, Jackson, Alonso, Baum, Deloitte, and others orchestrated a course of action that was specifically designed and intended to, and did: a) create and utilize a fabricated pretext to unlawfully terminate Plaintiffs' exclusive franchise agreement; b) seize, by physical force and with no judicial or other lawful process, all of the personal property of Fiscal used by Fiscal in the operation of its business; and c) create and utilize fabricated evidence to instigate a capricious prosecution of, and the attendant seizure of, Grigsby.

The Special Audit

On November 18, 1996, Defendant Penelas allegedly directed the County Manager to obtain a special audit of Fiscal's business. The responsibility for the audit was passed to Jackson, then Acting Director of the County's Audit and Management Services Department. Acting on Penelas' order, Jackson, with the assistance of Bass, Baum, Deloitte and others, allegedly began in December 1996 to demand every accounting and financial document that Fiscal had ever generated. Additionally, the County filed in February 1997, a Public Records Act action (Metropolitan Dade County v. Fiscal, 11th Judicial Circuit, Dade County, Case No. 97-04449 CA 32) against Fiscal, seeking to have Fiscal declared to be "a public agency." The audit was completed by Jackson in January of

1998. Plaintiffs allege that Penelas directed Bass and Jackson to fabricate evidence that could be used to argue that Fiscal was a department or agent of the County and that the gantry crane user fees that Fiscal collected at the Port were County funds. Accordingly, the Complaint alleges, at the direction of Penelas, Bass and Jackson encouraged Deloitte to revisit its interpretation of the franchise agreement.

The Deloitte Audit and Financial Restatements

Pursuant to the franchise agreement, Fiscal maintained and operated the cranes, renting the cranes on an hourly fee basis to the stevedoring companies that loaded and unloaded cargo ships that docked at the Port. Fiscal sent bills to the stevedoring companies for the hourly crane rental fees ("crane user fees"). The Complaint alleges that until the events giving rise to the lawsuit, the stevedores paid the crane user fees directly to Fiscal. According to the Plaintiffs, the County, Deloitte, the Port, Fiscal, the Internal Revenue Service and all others involved treated the crane user fees as the property of Fiscal, rather than the County's. According to the Complaint, Deloitte's audit reports for many years accurately reflected these financial arrangements and treated the crane user fees as the property of Fiscal. Plaintiffs allege that from 1990 to 1995, the financial statements of the Seaport did not include crane usage within the Seaport's operating revenues. Additionally, Plaintiffs allege that Deloitte and the County specifically knew of certain questionable expenditures made by Fiscal from the crane revenues, later called into question by the County.

Plaintiffs allege that in 1998, the other Defendants caused Deloitte to retroactively alter some of its audit reports of the Port to make them consistent with a false characterization of Fiscal as an County agency and the crane user fees as revenue of the Port. The restated audit report treated the crane user fees as "County Money." Additionally, Deloitte added the

phrase "crane usage" to its 1995 list of items included in the Seaport 1995 operating revenues. Deloitte also increased the stated amount of federal funds received by the Port in the Seaport's Restatement of the 1995 financial statements. Plaintiffs allege that these same altered accounting treatments were also applied to the 1996 financials of the Port.

Plaintiffs allege that Deloitte made the changes to the financial statements "for no reason other than to provide a jurisdictional perquisite for the prosecution of Grigsby under 18 U.S.C. § 666." The Complaint alleges that Deloitte capitulated to the other Defendants' request to change its accounting treatment in this arbitrary manner. According to Plaintiffs, but for Deloitte's capitulation, the other Defendants "likely would not have taken the predatory actions which followed shortly thereafter, which depended entirely on the new fabricated assertion that the crane revenues belonged to the County."

Contract Termination and The Resolution

On April 21, 1998, the County Manager was given a resolution to present to the Board, approving the termination of the franchise and implementing contract. The resolution was sponsored by Alonso, prepared by other Defendants, and approved as to form and legal sufficiency by Bass. The resolution referred to Jackson's January 16, 1998 audit report as having "found, among other things, 'mismanagement of the County's gantry crane operation, wasteful and abusive spending practices, [and] undocumented and unauthorized transactions....'" The resolution also stated "it is believed that Fiscal is currently retaining hundreds of thousands of collected user fees belonging to the County, in violation of contract requirements." Noting Jackson's recommendation that the County assume control of the crane operation "as soon as practical," the resolution directed the County Manager to do so. To support the resolution to terminate the Agreement.

According to the Complaint, that memorandum contained several material misrepresentations, assertedly designed to support the Defendants' theft of "Public Funds" theory. Subsequently, the County Commissioners passed the resolution. Based upon the results of the County Manager's audit of Fiscal and the passage of the resolution, in the Spring of 1998, the County issued a notice of default and then terminated the franchise contract. On May 18, 1998, acting in accordance with Jackson's statement that "the County should take immediate control of the operation," the County physically seized Fiscal's entire business, including the personal property and other assets of Fiscal, and began to run the business assertedly for its own benefit.

According to the Complaint, subsequent to the release of the special audit, Jackson and Bass presented the Federal Bureau of Investigation and representative of the United States Attorney's Office with fabricated evidence that Grigsby had used "County Money" and "Public Funds" to make unauthorized expenditures not directly related to crane operations, thereby stealing County funds.

DISCUSSION

Standard of Review

A complaint should not be dismissed "for failure to state a claim unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts" that would entitle the plaintiff to relief. Conley v. Gibson, 355 U.S. 41, 45 (1957); Bracewell v. Nicholson Air Services, Inc., 680 F.2d 103, 104 (11th Cir. 1982). In deciding a motion to dismiss, a court can only examine the four corners of the complaint. See Crowell v. Morgan Stanley Dean Witter Services, Co., Inc., 87 F.Supp. 2d 1287 (S.D. Fla. 2000). Additionally, a court must accept a

plaintiff's well pled facts as true and construe the complaint in the light most favorable to plaintiff. Scheuer v. Rhodes, 416 U.S. 232 (1974). The threshold of sufficiency that a complaint must meet is exceedingly low. Ancata v. Prison Health Servs. Inc., 769 F.2d 700, 703 (11th Cir. 1985); Geidel v. City of Bradenton Beach, 56 F.Supp.2d 1359, 1362 (M.D. Fla. 1999).

42 U.S.C. § 1983 and State Action

Plaintiffs allege that Deloitte's revision in 1998 of a "dormant 3 year old Seaport 1995 financial statement to show Fiscal's Money as the County's Money and its other auditing manipulations" was an integral part of Defendants' jointly orchestrated, conspiratorial, and tortious scheme to take Fiscal's business methods, assets and goodwill and instigate a prosecution of Grigsby. Plaintiffs allege further that Deloitte's conduct constituted state action and as such, Deloitte may be found liable for § 1983 violations. Deloitte contends that as a private entity functioning as an independent auditor for the Port, the Complaint fails to state a cause of action against it under 42 U.S.C. § 1983 because it fails to allege state action. Accordingly, Deloitte petitions the Court to find that Plaintiffs' § 1983 claims against Deloitte must be dismissed.

It is axiomatic that the Fourteenth Amendment, which is the constitutional authority for Plaintiffs' § 1983 claims, applies only to such action as may be fairly be said to be that of the states. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful. See Shelley v. Kramer, 334 U.S. 1, 13 (1984); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974). Thus, the only proper Defendants in a § 1983 action are those who represent the state in some capacity, whether they act in accordance with their authority or misuse it. Monroe v. Pape, 365 U.S. 167, 172 (1961).

The § 1983 plaintiff must establish that the actions of a private entity are properly attributable to a governmental entity. See Flagg Brothers v. Brooks, 436 U.S. 149, 156 (1978). In fact, when the Defendant is not a state agency or employee, state action may be found only in rare circumstances. See Harvey v. Harvey, 949 F.2d 1127, 1130. (11th Cir. 1992). In this circuit, the Court may ascribe governmental status to private conduct based upon 1) the public function test; 2) the state compulsion test; and 3) the nexus/joint action test. Accord, Willis v. The University Health Services, Inc., 993 F.2d 840 (11th Cir. 1992); Morast v. Lance, 807 F.2d 926, 931 (11th Cir. 1987).

Public Function Test

The Court may find state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State. This requirement of exclusivity is not satisfied merely by the conferral of monopoly by the State or extensively be government regulation; or merely by the performance of a public service. It requires delegation of a function which is uniquely and excessively governmental in nature. See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974); Public Utilities Comm'n v. Pollak, 343 U.S. 451, 462 (1952).

Plaintiffs have made no allegations that Deloitte's audit, or restatement of the Seaport's financial statements constituted a uniquely governmental function. According to the record, Deloitte, as an independent auditor, performed only a traditional accounting function routinely performed by a myriad of non-governmental entities. Moreover, while federal officers and investigators may have reviewed Deloitte's audit in furtherance of Grigsby's arrest and seizure, Deloitte did not participate in any such prosecutorial conduct and therefore did not perform a governmental function. Accordingly, the Complaint fails to state a factual predicate for ascribing state action on this basis.

Nexus/Joint Action Test

State action can be imputed where the state so far insulated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974). There must exist a "close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." Id. at 352. Further, the government entity must have been a joint participant in the very wrongdoing attributed to the private Defendant. See National Broadcasting Company v. Communications Workers of America, AFL-CIO, 860 F.2d 1022, 1027 (11th Cir. 1988). The question is whether the particular conduct at issue resulted from a government policy of decision. In fact, "the governmental actor must be ultimately responsible, no less than the private actor, for the particular wrongful conduct attributed to the private actor." Greco v. Orange Memorial Hospital Corp., 513 F.2d 873, 882 (5th Cir. 1975). Further, the relationship must be sufficiently symbiotic that the governmental entity has joint responsibility for allegedly wrongful private conduct. "The symbiotic relationship must involve the alleged constitutional violation." Patrick v. Floyd Medical Center, 201 F.3d 1313, 1315 (11th Cir. 1993).

The Complaint contains no allegation that the County and Deloitte were joint participants in the restatements of the 1995 financial statements of the Seaport. At most, the Complaint alleges that the Defendants encouraged Deloitte to undertake the asserted restatements, and that Deloitte acquiesced. Further, the Complaint fails to allege that the County was in any way a participant in the accounting function. Moreover, the Complaint fails to allege with particularity that the County insulated itself into a position of interdependence with Deloitte such that the two might be recognized as joint

participants in the accounting restatements. The Complaint ascribes the asserted wrongdoing to Deloitte alone, though with the County's encouragement. Therefore, the Complaint fails to ascribe state action to Deloitte under the nexus/joint action test.

The Compulsion Test

It is only when a state has exercised coercive power or has significant encouragement, either overt of covert, that the choice must in law be deemed to be that of the state. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982). The government must exercise such coercive power that the private entity's action must, in law, be deemed that of the government. Id. at 1004.

The Complaint alleges that the County defendants conferred with Deloitte beginning in early 1997 on a plan to switch the accounting treatment to establish a fabricated basis for seizing the business and prosecuting Grigsby. The Complaint further alleges that the County "induced Deloitte" to revise its longstanding accounting treatment of the crane user fees. Because Plaintiffs have sufficiently pled that some form of encouragement for Deloitte's act of conducting the audit and the restatements may have been tantamount to an act of the County, the Court must find that state action may be ascribed to Deloitte. The Court must therefore deny Deloitte's motion to dismiss Plaintiffs § 1983 claims.

As such, the Court now turns to the Complaint to determine whether Plaintiffs have stated a claim of § 1983 violations upon which relief could be granted.

Count I - Denial of Due Process

Plaintiffs contend that they possessed a property right in the franchise agreement which was "expropriated by arbitrary and capricious means." Plaintiffs contend that the "gist of the

claim focuses on the improper motivation of the Defendants, not on whether they breached the terms of any particular agreement." Plaintiffs do not contend that they possessed a liberty interest in their contract with the county but rather, that the contract was "property" within the meaning of the Fourteenth Amendment. This assertion is incorrect as a matter of law. The Supreme Court in Logan v. Zimmerman Brush, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), provided useful guidance for determining what interests constitute "property" as envisioned by the Fourteenth Amendment. In that case the Court remarked that "[t]he hallmark of property ... is an individual entitlement grounded in state law, which cannot be removed except 'for cause'." Id. at 430, 102 S.Ct. at 1155. See also, Board of Regents v. Roth, 408 U.S. 564, 576-78, 92 S.Ct. 2701, 2708-10, 33 L.Ed.2d 548 (1972) (no property interest in having contract renewed where previous contract did not require renewal absent sufficient cause). Under this test Plaintiffs did not possess a property interest in their contract with the County. Accordingly, Plaintiffs have failed to state a claim of denial of due process upon which relief could be granted and Deloitte's motion to dismiss as it relates to Count I of the Complaint must be granted.

Count II - Taking Without Compensation

Count II of the Complaint alleges that Fiscal's personal property was improperly seized without compensation. Specifically, the Complaint alleges that "Defendants denied Fiscal's management access to Fiscal's own secure, fenced work area, using posted armed security guards to prevent access. Defendants then took possession of Fiscal's procedure manuals, appropriated Fiscal's business methods, and began using over $1,000,000 worth of Fiscal's tools, spare parts and equipment, without any compensation to Fiscal."

The Takings Clause of the Fifth Amendment of the U.S. Constitution provides: "nor shall private property be taken for public use, without just compensation." Villas of Lake Jackson v. Leon County, 121 F.3d 610, 614 (11th Cir. 1997); The Reserve, Ltd. v. Town of Longboat Key, 17 F.3d 1374, 1379-80 (11th Cir. 1994); the only substantive due process claim is for "arbitrary and capricious" taking of property. A substantive due process analysis, within the deprivation of a property interest context, involves two queries: "1) was the plaintiff deprived of a constitutionally protectible property interest? and 2) assuming a property interest, was the deprivation of that property interest for an improper motive and by means that were pretextual, arbitrary and capricious and without any rational basis?" The Reserve, Ltd. at 1379 (11th Cir. 1994).

Plaintiffs claim that the Defendants deprived them of access to their property, constituting a taking without due process in violation of the Fifth Amendment. In Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), the Supreme Court held that a property owner must exhaust state procedures for obtaining just compensation, including resort to a state inverse condemnation action, before bringing a "taking" claim under 42 U.S.C. 1983. Id., 105 S.Ct. at 3121-22. The Court reasoned that the Fifth Amendment does not prohibit takings, only uncompensated takings. "[B]ecause the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not 'complete' until the State fails to provide adequate compensation for the taking." Id. Thus, "if a State provides an adequate remedy for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." Id. at 3121. Florida law provides compensation for deprivation or impairment of the right of

access, Anhoco Corp. v. Dade County, 144 So.2d 793 (Fla. 1962), which may be enforced in an action for inverse condemnation. See, e.g., Pinellas County v. Austin, 323 So.2d 6 (Fla. Dist. Ct. App. 1975). As Plaintiffs have not shown that the Florida procedures were unavailable or inadequate; until they have utilized those procedures, their takings claim is premature. Plaintiffs have failed to sufficiently allege any argument in support of their claim for denial of due process and accordingly, Defendants' motion to dismiss as it related to Count II of the Complaint must be granted.

Counts III and IV - Denial of Due Process and Unreasonable Seizure

Count III alleges that "Defendants, with the assistance of Deloitte and others, fabricated evidence to the effect that Grigsby had stolen 'Public Funds' and used that fabricated evidence to deceive federal prosecutors into initiating a grand jury proceeding (where the jurors were similarly deceived) and a subsequent prosecution." Count IV alleges that "using deliberately fabricated evidence, Defendants deceived the prosecutor into believing that probable cause existed and proximately caused the deception of the grand jury, the initiation of a prosecution that was not backed by probable cause, and an unlawful seizure and restraint of Grigsby." Plaintiffs argue that § 1983 provides a remedy against a public official's use of "false evidence" to support a criminal prosecution.

In order to determine whether Plaintiffs have stated a claim for Deloitte's violation of their constitutional due process rights, the Court must first determine whether a constitutional right has been established. Secondly, the court must determine whether Plaintiffs have alleged sufficiently that Deloitte violated such a right.

The Court is persuaded that there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government. Perhaps because the proposition is virtually self-evident, the Court is not aware of any prior cases that have expressly recognized this specific right, but that does not mean that there is no such right. Rather, what is required is that government officials have "fair and clear warning" that their conduct is unlawful. See United States v. Lanier, 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) (quoting Anderson v. Creighton, 483 U.S. 635,640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

While a constitutional due process right has clearly been established, Plaintiffs have failed to allege sufficiently that Deloitte's conduct violated such a right. Plaintiffs point to cases that stand for the general proposition of law that it is unlawful to pursue a criminal conviction on the basis of "false evidence." The relevant question in this case is, however, not whether it is unlawful to use false evidence, but whether it was clearly established that Deloitte's undertaking of the audit and financial restatements constitutes the procurement of "false evidence."

The Plaintiffs' vague and conclusory allegations of fabricated evidence do not establish a § 1983 liability. The Eleventh Circuit has consistently held that a complaint must allege relevant facts "with some specificity." GJR Investments, Inc. v. County of Escambia, 132 F.3d 1359, 1367 (11th Cir. 1998). More than mere conclusory notice pleading is required. "[A] complaint will be dismissed as insufficient where the allegations it contains are vague and conclusory." Fullman v. Graddick, 739 F.2d 553, 556-57 (11th Cir. 1984). Moreover, in reviewing a motion to dismiss, the court need only accept "well-pleaded facts" and "reasonable inferences drawn from those facts." Oladeinde v. City of Birmingham, 963 F.2d 1481,

1485 (11th Cir. 1992). "[U]nsupported conclusions of law or of mixed fact and law have long been recognized not to prevent a Rule 12(b)(6) dismissal." Marsh v. Butler County, 268 F.3d 1014, 1036 (11th Cir. 2001). Plaintiffs have failed to allege with any specificity that Deloitte "used the fabricated evidence to deceive federal prosecutors" or that Deloitte "deceived the prosecutor into believing that probable cause existed." Instead, Plaintiffs allege that Deloitte aided in the fabrication of evidence that was eventually submitted by others to prosecutorial authorities.

Plaintiffs claim that there is a causal connection between Deloitte's audit and financial restatements and Grigsby's subsequent prosecution, but they do not allege any facts to support this connection. In fact, the Complaint contains no allegation that Deloitte transmitted any information regarding the financial statements to anyone other than the Seaport, its client. The Complaint also fails to allege that Deloitte had any knowledge that any of the Defendants would communicate with federal prosecutors. Further, Plaintiffs do not allege that Deloitte directed the FBI or the U.S. Attorneys' Office to conduct the investigation or to pursue the subsequent prosecution of Grigsby. Additionally, any causal connection that may have existed between Deloitte's restatements and Grigsby's subsequent indictment was severed by the intervening, free, independent and volitional acts of the FBI, the U.S. Attorneys' Office and the grand jury. See Barts v. Joyner, 865 F.2d 1187, 1195 (11th Cir. 1989); Jones v. Cannon, 174 F.3d 1271, 1287 (11th Cir. 1999); Dixon v. Burke County, Ga., 303 F.3d 1271 (11th Cir. 2002). Plaintiffs argue that these cases do not apply if the "plaintiff can show that these intervening acts were the result of deception or undue pressure by the Defendant." Plaintiffs, have, however, failed to allege any facts that demonstrate that the Defendants had the ability to and did mislead or unduly influence the FBI, the U.S. Attorneys' office or the grand jury.

While Plaintiffs have established the existence of a constitutional due process right, they have failed to allege sufficiently that Deloitte violated such a right. Accordingly, Deloitte's motion to dismiss as it pertains to Plaintiffs' § 1983 claims must be granted.

Count V - Conspiracy

Conspiring to violate another person's constitutional rights violates Section 1983. Dennis v. Sparks, 449 U.S. 24, 27, 101 S.Ct. 183, 186 (1980). To establish a prima facie case of Section 1983 conspiracy, a plaintiff must show, among other things, that the defendants "reached an understanding to violate his rights." Rowe v. Fort Lauderdale, 279 F.3d 1271 (11th Cir. 2002) quoting Strength v. Hubert, 854 F.2d 421, 425 (11th Cir. 1988). The plaintiff does not have to produce a "smoking gun" to establish the "understanding" or "willful participation" required to show a conspiracy, but must show some evidence of agreement between the defendants. Id. at 1284. Section 1983 does not afford a remedy against a private person unless that person is shown to have conspired with one or more state actors. NAACP v. Hunt, 891 F.2d 1555, 1563 (11th Cir. 1990).

To sustain a conspiracy action under § 1983 a plaintiff must show an underlying actual denial of its constitutional rights. See Slavin v. Curry, 574 F.2d 1256, 1262 (5th Cir. 1978); modified on denial of r'hrg, 583 F.2d 779 (5th Cir. 1978); Strength v. Hubert, 854 F.2d 421, 425 (11th Cir. 1988) (stating theoretical basis of and requirements for stating a claim under § 1983 of conspiracy to violate constitutional rights).

Count V of the Complaint alleges that "Defendants conspired with Deloitte, Alonso, Baum and possibly others, to deprive Fiscal and Grigsby of their Constitutional rights by fabricating false evidence and then using the fabricated evidence to confiscate Fiscal's business and property in

violation of the Fourth and Fourteenth Amendments, and to instigate a capricious indictment, prosecution and seizure of Grigsby in violation of the Fourth, Fifth and Fourteenth Amendments." As Plaintiffs have failed to demonstrate the denial of their underlying constitutional rights, the conspiracy claim must be dismissed.

Count VI - Accountants' Fraud

In order for a plaintiff to satisfactorily allege a case for fraud, under Florida law, the plaintiff must plead (1) a false statement or misrepresentation of material fact, (2) the representor's knowledge at the time the misrepresentation is made that the statement is false, (3) an intention that the misrepresentation induce another to act, (4) action in justifiable reliance on the representation, and (5) resulting damage or injury. MeterLogic, Inc. v. Copier Solutions, Inc., 126 F.Supp.2d 1346 (S.D.Fla. 2000).

Count VI of Complaint alleges that Deloitte had a public responsibility which it violated by fraudulently reversing its accounting treatment of the crane revenues, at the request of other Defendants. The Complaint further alleges that Deloitte reversed its accounting treatment of the crane revenues with knowledge of its misrepresentations and with the intent of enabling the other Defendants to use these misrepresentations to deceive prosecutorial authorities. Assertedly, Plaintiffs were severely injured by Deloitte's fraud.

Count VI, however, contains no allegations of fraudulent statements made by Deloitte to the Plaintiffs, upon which they relied to their detriment. Further, Plaintiffs have failed to properly plead their fraud claim as required by Federal Rule of Civil Procedure 9(b). Rule 9(b) of the Federal Rules of Civil Procedure provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall

be stated with particularity." Fed. R. Civ. P. 9(b). This rule "serves an important purpose in fraud actions by alerting defendants to the 'precise misconduct with which they are charged' and protecting defendants 'against spurious charges of immoral and fraudulent behavior.'" Durham v. Business Management Assoc., 847 F.2d 1505, 1511 (11th Cir. 1988) (quoting Seville Indus. Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 791 (3rd Cir. 1984), cert. denied, 469 U.S. 1211, 105 S.Ct. 1179, 84 L.Ed.2d 327 (1985)). Rule 9(b) may be satisfied if the complaint sets forth: 1) precisely what statements were made in what documents or oral representations of what omissions were made, and 2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and 3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants "obtained as a consequence of the fraud." Medalie v. FSC Securities Corp., 87 F.Supp.2d 1295, 1306 (S.D. Fla. 2000). Based upon the foregoing, Plaintiffs' claim for accountant fraud must be dismissed.

Count VII - Malicious Prosecution

The tort of malicious prosecution is premised on the right of an individual to be protected from unjustifiable litigation or unwarranted criminal prosecution. Against this right, the need of society to bring criminals to justice by protecting those who, in good faith, report and legally prosecute persons apparently guilty of crime must be balanced. The latter need, in addition to the public policy in favor of the termination of litigation, dictates the plaintiff's heavy burden of proof. Burns v. GCC Beverages, Inc., 502 So.2d 1217, 1219 (Fla. 1986).

In order to state a claim for malicious prosecution, a plaintiff must show 1) the commencement or continuance of an

original criminal civil judicial proceeding, 2) its legal causation by the present proceeding, 3) its bonafide termination in favor of the present plaintiff, 4) the absence of probable cause for such proceeding, 5) the presence of malice therein, and 6) damage conforming to legal standards resulting to plaintiff. Buchanan v. Miami Herald Publishing Co., 230 So.2d 9, 11 (Fla. 1969).

The parties do not dispute the existence of three of the elements required to prove the tort of malicious prosecution: (1) the commencement and continuation of a criminal judicial proceedings; (2) its bona fide termination in favor of the plaintiff, and (3) damages resulting to the plaintiff. A fourth element, the presence of malice, may be inferred from the absence of probable cause for such prosecution, the fifth element. The sixth element, legal causation, requires a showing that the defendant was in some way responsible for the criminal prosecution. See Harris v. Lewis State Bank, 482 So.2d 1378, 1381 (Fla. 1st DCA 1986).

Although legal causation is usually established by the signing of a complaint or affidavit, there is authority for the proposition that the giving of information may constitute the initiation of prosecution, if the information was known by the giver to be false. The real instigator cannot escape liability by showing he was not the prosecutor of record. The test is whether the defendant's action was the proximate and efficient cause of putting the law in motion. Although one may not have intended to institute a criminal proceeding, he may be liable if he afterward continued the prosecution or gave it momentum. See Harry Pepper & Associates, Inc. v. Lasseter, 247 So.2d 736 (Fla. 3rd DCA 1971), cert. den., 252 So.2d 797 (Fla. 1971). Plaintiffs charge the Defendants, including Deloitte, with malicious prosecution, for instigating criminal proceedings against Plaintiff Grigsby by providing false and misleading evidence to the investigators and the prosecutors who, in turn,

assertedly misled the grand jury that issued the indictment. The Complaint, however, contains no allegation that Deloitte transmitted any information to anyone other than the Port, its client. The Complaint also fails to allege that Deloitte had any knowledge that any of the Defendants would communicate with federal prosecutors. The Complaint only charges Deloitte with aiding and abetting the County's effort to instigate the federal investigation of Grigsby. Plaintiffs' claim of malicious prosecution against Deloitte must therefore be dismissed.

CONCLUSION

Based upon the foregoing, it is

ORDERED AND ADJUDGED that Defendant Deloitte's Motion to Dismiss is GRANTED. It is further

ORDERED AND ADJUDGED that this cause is CLOSED for administrative purposes.

DONE AND ORDERED in Chambers at Miami, Florida this 30th day of April, 2003.

/s/
Donald L. Graham
U.S. DISTRICT JUDGE

cc: Magistrate Judge Garber
Counsel of Record

APPENDIX E

United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

Calvin Grigsby; and Fiscal Operations, Inc.,	)	
Plaintiffs-Appellants,	)	
V.	)	No. 03-12576-II
Miami-Dade County, Florida, et al.,	)	D.C. No. 01-04798-CV-DLG
Defendant,	)	
Alex Penelas; Steven B. Bass; Kathy Jackson; Miriam Alonso; and Rachel Baum.	)	
Defendants-Appellees.	)	

Calvin Grigsby; and Fiscal Operations, Inc.,	)	
Plaintiffs-Appellants,	)	
V.	)	No. 03-12577-II
Miami-Dade County, Florida,	)	D.C. No. 01-04798-CV-DLG
Defendant-Appellee,	)	

Alex Penelas, et al.,	)	
	)	
Defendants.	)	
Calvin Grigsby; and Fiscal Operations, Inc.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
V.	)	No. 03-12578-II
	)	
Miami-Dade County, Florida, et al.;	)	D.C. No. 01-04798-CV-DLG
	)	
Defendants,	)	
	)	
Deloitte & Touche, L.L.P.,	)	
	)	
Defendant-Appellee.	)	

On Appeal from the United States District Court
for the Southern District of Florida

(April 28, 2004)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, _____ F.2d _____).

Before: TJOFLAT, BARKETT and SILER*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing en Banc are DENIED.

ENTERED FOR THE COURT:

_____/s/_____
UNITED STATES CIRCUIT JUDGE

*Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

ORD-42
(12/01)

APPENDIX F

United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

Calvin Grigsby; and Fiscal Operations, Inc.,	)	
Plaintiffs-Appellants,	)	
V.	)	No. 03-12576
Miami-Dade County, Florida, et al.,	)	D.C. No. 01-04798-CV-DLG
Defendant,	)	
Alex Penelas; Steven B. Bass; Kathy Jackson; Miriam Alonso; and Rachel Baum.	)	
Defendants-Appellees.	)	

Calvin Grigsby; and Fiscal Operations, Inc.,	)	
Plaintiffs-Appellants,	)	
V.	)	No. 03-12577
Miami-Dade County, Florida,	)	D.C. No. 01-04798-CV-DLG
Defendant-Appellee,	)	

Alex Penelas, et al.,	)	
	)	
Defendants.	)	

Calvin Grigsby; and Fiscal Operations, Inc.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
V.	)	No. 03-12578
	)	
Miami-Dade County, Florida, et al.;	)	D.C. No. 01-04798-CV-DLG
	)	
Defendants,	)	
	)	
Deloitte & Touche, L.L.P.,	)	
	)	
Defendant-Appellee.	)	

Appeals from the United States District Court
for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached 11th Cir. R. 36-1 affirmance without opinion included herein by reference, is entered as the judgment of this Court.

Entered: March 2, 2004
For the Court: Thomas K. Kahn, Clerk
By: Jackson, Jarvis

ISSUED AS MANDATE
May 06, 2004
U.S. Court of Appeals
Atlanta, GA

APPENDIX G

---

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person with the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX H

Fourth Amendment to the U.S. Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX I

Fifth Amendment to the U.S. Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX J

Fourteenth Amendment to the U.S. Constitution

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; not deny to any person within its jurisdiction the equal protection of the laws.

Section 2: Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3: No person shall be a Senator or Representative in Congress, or elector of President or Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4: The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

FISCAL OPERATIONS, INC. and CALVIN GRIGSBY, Plaintiffs, v. MIAMI-DADE COUNTY, FLORIDA, ALEX PENELAS, STEVEN B. BASS, KATHY JACKSON, MIRIAM ALONSO, RACHEL BAUM and DELOITTE & TOUCHE, LLP, Defendants.	Case No. 01-4798 **FIRST AMENDED COMPLAINT**

Fiscal Operations, Inc. ("Fiscal") and Calvin Grigsby ("Grigsby"), for their Complaint against Defendants Miami-Dade County (the "County"), Alex Penelas ("Penelas"), Steven B. Bass ("Bass"), Kathy Jackson ("Jackson"), Miriam Alonso ("Alonso"), Rachel Baum ("Baum"), and Deloitte & Touche ("Deloitte") state:

I. NATURE OF THE ACTION

1. Beginning in late 1996 and continuing through mid-1998, the County, Penelas, Bass, Jackson, Alonso, Baum. Deloitte, and others orchestrated a course of action that was specifically designed and intended to, and did:

(a) crate and utilize a fabricated pretext to unlawfully terminate an exclusive franchise previously granted by the County to Fiscal to operate its business at the Port of Miami (the "Port") and to unlawfully terminate the contract through which the County had implemented the franchise granted to Fiscal;

(b) seize, by physical force and with no judicial or other lawful process, all of the personal property of Fiscal used by Fiscal in the operation of its business; and

(c) create and utilize fabricated evidence to instigate a capricious prosecution of, and the attendant seizure of, Grigsby.

2. Pursuant to 42 U.S.C. § 1983 and the laws of Florida, Fiscal and Grigsby seek to recover the millions of dollars in loses sustained by them as the direct result of this abuse of governmental power by the Defendants and others that violated the Constitutional rights of Fiscal and Grigsby and their rights under the laws of Florida in at least the following ways:

(a) the use by the Defendants of a fabricated pretext and improper motive to terminate the franchise and contract rights of Fiscal was a violation of the due process rights

of Fiscal guaranteed to Fiscal by, among other things, the Fifth and Fourteenth Amendments to the Constitution of the United States:

(b) the physical seizure of the property of Fiscal by the Defendants, in the absence of any lawful process or compensation, constituted an unlawful taking of the property of Fiscal in violation of the rights of Fiscal guaranteed to it by, among other things, the Fifth and Fourteenth Amendments to the Constitution of the United States to be free of such unlawful taking without just compensation;

(c) the creation and use by the Defendants and others of fabricated evidence to procure the prosecution and seizure of Grigsby is a violation of the rights of Grigsby guaranteed to him by, among other things, the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States to be free of the use of such fabricated evidence and such capricious prosecution and improper seizure based upon fabricated evidence;

(d) deliberate fraudulent misrepresentation by Deloitte in violation of its duty to the public and to Fiscal and Grigsby under the law of Florida enabled the Defendants to take these predatory actions against Fiscal and Grigsby; and

(e) the instigation of a malicious prosecution against Grigsby by the Defendants violated Grigsby's rights under the law of Florida.

II. JURISDICTION AND VENUE

3. This action arises under the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983 and the laws of Florida. This Court has authority to award damages to Fiscal and Grigsby for the Constitutional violations under 42 U.S.C. § 1983. Jurisdiction of the federal causes of action conferred by 28 U.S.C. § 1331. Jurisdiction of the causes of action under Florida law is conferred by 28 U.S.C. § 1367. Venue is proper in the Southern District of Florida under 28 U.S.C. § 1391(b).

III. PARTIES

4. Fiscal is a private, for-profit corporation incorporated and domiciled in the State of California. Until it was unlawfully deprived of its franchise and business by Defendants, Fiscal managed, maintained, operated and rented to stevedoring companies the gantry cranes at the Port.

5. Grigsby is an individual residing and domiciled in the State of California. Grigsby is the CEO and President of Fiscal and has, in addition to his duties with Fiscal, conducted other substantial business in the County, including the origination and implementation of financing transactions.

6. The County is a municipal equity whose actions are directed by a Board of County Commissioners (the "Board"). The Port is a Department of the County.

7. Penelas is an individual who, at all material times, was either a County Commissioner or the Mayor of the County.

8. Bass is an individual who, at all material times, was an Assistant County Attorney.

9. Jackson is an individual who, at all material times, was the Acting Director of, or the Director of, the Audit and Management Services Department of the County.

10. Alonso is an individual who, at all material times, was a County Commissioner.

11. Baum is an individual who, at all material times, was the Finance Director of the County.

12. Deloitte is a limited partnership with a nationwide network of offices, including an office in Miami, Florida. During the material time period, the County and the Port were audit clients of Deloitte.

13. Other persons who may properly be named as Defendants may come to the attention of Fiscal and Grigsby during discovery. Fiscal and Grigsby intend to seek early discovery to ascertain whether additional Defendants should be named.

IV. FACTUAL BACKGROUND

A. Summary of the Unlawful Acts of Defendants

14. As detailed below, Fiscal was awarded the exclusive franchise to maintain and operate the gantry cranes at the Port from 1982 through 2002. Pursuant to implementing contracts with the County, Fiscal maintained and operated the cranes during this same period (until the County's unilateral

termination in 1998), renting the cranes on an hourly fee basis to the stevedoring companies that loaded and unloaded cargo ships that docked at the Port.

15. Fiscal sent bills to the stevedoring companies for the hourly crane rental fees ("Crane User Fees"). The stevedores paid the Crane User Fees to Fiscal. Until the acts of Defendants complained of herein, the County, Fiscal, the independent auditors for the County, the Port, and Fiscal, the Internal Revenue Service and all others involved treated the Crane User Fees as the property of Fiscal.

16. In 1996-1998, the Defendants, for the improper motives detailed below, undertook concerted action to terminate Fiscal's franchise to operate its business at the Port, and to terminate the implementing contract between the County and Fiscal providing for Fiscal to maintain and operated cranes (the "Agreement").

17. To attempt to justify the Defendants' actions, Bass and Jackson, at the direction and request of Penelas, fabricated a false assertion that Fiscal was a department or agent of the County and that the Crane User Fees were the property of the County and hence were "County Money" and "Public Funds." At the request of the other Defendants, Deloitte then altered its audit reports to make them consistent with this false assertion, overturning several years of previous audit reports to the contrary, with no accounting justification for the change.

18. This "County Agency" and "Public Funds" assertion was not only fabricated, it was patently inconsistent with all previous positions taken by the County. By way of example only:

(a) In pleadings filed in a personal injury case resulting from an accident involving the cranes (*Smith v. Fiscal, et al.*, 11th Judicial Circuit, Dade County, Case No., 94-13750-CA-02), the County Attorney's office filed pleadings specifically denying that Fiscal was an agent for the County, asserting that Fiscal was an independent contractor and stating that the only connection between the injury and the County was the Agreement between the County and Fiscal; and

(b) Bass signed a complaint by the County against the Department of Revenue of the State of Florida filed October 10, 1996 (Metropolitan Dade County v. Department of Revenue, 11th Judicial Circuit Dade County, Case No. 96-20586-CA-04), in an action by which the County sought to avoid liability for sales taxes on the Crane User Fees, in which the County disavowed custody and control of the cranes and any interest in the Crane User Fees stating:

> "30. The County has contractually relinquished custody of the gantry cranes to a management company for the purposes of leasing the cranes to stevedoring companies..."
>
> ***
>
> 44. ... the Department already collects a sales tax on the gantry cranes when the

> stevedoring company leases the cranes from [Fiscal]"

19. Based upon their sham "County Agency" and "Public Funds" assertion, the Defendants accused Fiscal and Grigsby, in public and private meetings, in civil litigation, and in communications with investigators of the United States Attorney's office, of stealing Public Funds by making expenditures not directly related to the operation of the cranes.

20. The Defendants invented "evidence" to bootstrap their sham "County Agency" and "Public Funds" assertion in the following ways, among others:

> (a) Bass repeatedly advised the Board and other County officials that the Crane User Fees were "County Money" and "Public Funds";
>
> (b) Jackson prepared an "audit" repeatedly stating that the Crane User Fees were "Public Funds" that had been misappropriated by Fiscal; and
>
> (c) Jackson, Baum, Bass and others induced Deloitte to reverse its longstanding accounting treatment of the Crane User Fees as the property of Fiscal and to switch to a treatment which would support the Defendants' new assertion that the fees were county property, even though there was no accounting basis for the switch.

21. Using this false assertion and the evidence they had fabricated to support it, Penelas, Bass and Jackson induced the County Manager to seek authority from the Board to

terminate Fiscal's franchise and the implementing contract, falsely stating that Fiscal was stealing Public Funds.

22. The Defendants also used the sham "County Agency" and "Public Funds" assertion and fabricated supporting evidence to procure the capricious indictment and federal prosecution of, and the improper seizure of, Grigsby. The Defendants falsely advised agents of the United States Attorney's Office that Grigsby had stolen "public funds" exploiting their exclusive and superior knowledge of the underlying relationship and arrangement between Grigsby and the County to hide the true nature and history of that relationship and arrangement from the federal agents. In effect, the federal agents knew only the self-serving information that the Defendants chose to share and were not shown the pertinent facts which would expose the falsity of their "theft of public funds" charge.

23. The arbitrary reversal of the treatment of the Crane User Fees by Deloitte in its audit of the Port was particularly egregious and damaging to Fiscal and Grigsby. In its audit reports covering at least 1990 through 1995, Deloitte stated that operating revenues of the Port included "[i]tems of income...relating to wharfage, dockage, rental, ground transportation, water and electric sources and miscellaneous port services are classified as operating revenues..." Crane User Fees were not included as items of revenue to the Port.

24. In 1998, at the request of the other Defendants but with no accounting basis for its action, Deloitte simply "restated" the 1995 financial statements of the Port to treat the Crane User Fees as revenues of the Port and to completely re-characterize the financial arrangement of the parties as an agency arrangement, to support the fabricated "County Agency" and "Public Funds" assertion. Operating revenues of the Port were now said to include "[I]tems of income... relating to

wharfage, dockage, crane usage, rental, ground transportation, water and electric services, and miscellaneous port services are classified as operating revenues..." [emphasis added].

25. If Deloitte has not capitulated to the other Defendants' request to change its accounting treatment in this arbitrary manner, the other Defendants likely would not have taken the predatory actions which followed shortly thereafter, which depended entirely on the new fabricated assertion that the crane revenues belonged to the County.

B. Fiscal and Grigsby Become Targets of the County's Corrupt Practices

26. For many years, the Commissioners of the County and other County employees and representatives have used the Port of Miami (as well as Miami International Airport) as an "off-book" source of political contributions, jobs for relatives and friends, money to pay for social events and parties, and favors of all kinds. Private contractors who perform services at the Port (and at the Airport) have been constantly pressured to contribute portions of their revenues to support the demands of elected and appointed officials for these "off-book" benefits. This has become a cost of doing business with the County.

27. Fiscal and Grigsby became targets of this public corruption when they began to operate a business at the Port in 1982. The involvement of Fiscal and Grigsby with the County and the Port grew out of an opportunity the County perceived in the late 1970's to develop a major cargo handling business at the Port to complement the cruise ship business at the Port. To enable the County to proceed with this opportunity under the

best financial circumstances, Grigsby, in response to a County Request for Proposals for financing structures, created and implemented an innovative bond financing program for the County, that, among other things, called for private ownership and operation of the gantry cranes. When the private entity originally designated to maintain and rent the cranes backed out of the program, Grigsby formed Fiscal to take on the management, maintenance, operation and rental of the gantry cranes. In 1982 the County granted Fiscal a twenty-year exclusive franchise (1982-2002) to maintain, operate and rent to stevedores the cranes at the Port, which arrangement was implemented through an operating contract, which also had an initial term of 1982-2002.

28. In reliance on the twenty-year franchise and the implementing Agreement, Fiscal and Grigsby invested considerable time and resources in obtaining and developing the expertise, personnel, equipment, and suppliers necessary to assure a successful long-term future for Fiscal's operation. Among other things, Fiscal and Grigsby retained the necessary top managers for the crane operation and brought them to Miami, located and established relationships with the necessary suppliers, trained and employed all union personnel necessary to run the crane operation, developed and put into effect all of the business methods necessary to run the crane operation at top efficiency and effectiveness, developed a full set of procedure manuals for use in the operation, purchased the necessary equipment to run the operation, went without compensation or profits for several years during a lengthy start-up period, and assumed responsibility for repayment (under certain circumstances) of all of the County's initial start up advances made pursuant to the Agreement by the County to Fiscal.

29. Fiscal and Grigsby made these substantial investments in time and resources because they anticipated that, under their fixed-fee Agreement with the County, Fiscal would

be able to earn a profit on its operations during the latter part of the twenty-year term, after repaying the start-up operating advances made by the County to Fiscal in the early years of the arrangement.

30. In addition to the considerable business risks involved in this demanding project, Fiscal and Grigsby were also subjected to the full brunt of the County's corrupt practices. During the entire period that Fiscal and Grigsby were developing the crane operation, the County pressured Fiscal to use Fiscal's revenues, primarily the Crane User Fees, for a variety of purported civic and promotional events and parties, to put County employees on Fiscal's payroll, to provide cars for County employees, to pay for political consultants to the County Mayor, to make political contributions, and to pay for a wide variety of parties, civic events, meals, drinks and other entertainment for the benefit of County Officials. The pressure on Fiscal was typically applied by County officials whenever the County ran low on County or Port budgeted "promotional funds" or did not want particular expenditures to be discussed in public meetings. Penelas and Alonso, each of whom chaired the County Commission's Maritime and Trade Committee during Fiscal's tenure, were aware of this pattern of corrupt activity and were specifically aware that Fiscal and Grigsby were among the private businesses at the Port that were targeted by the County for these payments.

31. Because Fiscal fully documented and reported to the County each of its expenditures, including each such expense that the County imposed on it, all involved County representatives were fully aware of the subject expenditures by Fiscal, as was Deloitte, the independent auditor for the County and for the Port.

32. All involved County officials and auditors, both internal and external, also knew that Fiscal would have to use

its own funds to satisfy such demands by the County. The regulatory framework within which the County operates does not allow the use of County Money (i.e., "Public Funds") for the types of expenses the County required Fiscal to make, and it is unlawful for the County to spend money without formal appropriation and inclusion in a budget after a public hearing.

33. Deloitte specifically knew that any such expenditures would have to come from Fiscal's own funds. Pursuant to the implementing contract, as it was revised in 1988, Fiscal was entitled to an annual fixed fee (negotiated annually) for its work and to the revenues (called Excess Usage Fees) generated by the operation of the cranes in excess of a fixed number of hours per year. Fiscal agreed to apply the Excess User Fees initially toward repayment of the operating advances that the County had made to Fiscal; Fiscal was entitled to keep the Excess User Fees once the advances had been repaid. Deloitte's audit reports for many years accurately reflected these financial arrangements and treated the Crane User Fees as the property of Fiscal.

C. The County Seizes Fiscal's Business and Instigates a Capricious Prosecution and Seizure of Grigsby, Using Deliberately Fabricated Evidence

34. In 1992, financial projections endorsed by the County and made available to Fiscal and the County indicated that Fiscal would become a profitable business under the Agreement before the end of the initial twenty year term of the franchise and the implementing contract (2002).

35. In late 1995 and early 1996, the County's Audit and Management Services Department was engaging in a debate with the Port Director about Fiscal's business, indicating the desire of the County to take control of the financial aspects of Fiscal's business, purportedly to improve the County's cash flow and financial position. The Port Director's response to the inquiries of the internal County auditors was that Fiscal was properly performing its functions in accordance with the Agreement and that Fiscal was a private company legally entitled under the implementing contract and otherwise to handle its own money and bank accounts. Fiscal's performance under the Agreement could not seriously be questioned, in as much as, in 1994, Fiscal had received a public commendation from the County for Fiscal's exceptional performance under the Agreement.

36. During the latter part of 1996, County officials who wished to take control of Fiscal's business were presented with both an opportunity and a major threat. The Miami Herald ran a series of articles suggesting corruption in the County's administration of the Port and focusing particularly on the types of expenditures described in paragraph 31 above that Fiscal had made in response to County demands. This publicity coincided with the election of Penelas to the position of mayor and the institution of a strong mayor system in the County. Penelas, aware that the County's corrupt activity at the Port was now "the subject of public inquiry," directed, on November 18, 1996, that the County Manager obtain a special "audit" of Fiscal's business. The responsibility for the audit was passed to Jackson, then Acting Director of the County's Audit and Management Services Department.

37. This order for a special audit of Fiscal's business was duplicitous. Penelas had been a County Commissioner, had chaired the Maritime and Trade Committee, and knew very well that the County had imposed expenditures of the type

described above on Fiscal and other private contractors at the Port for many years. Penelas also knew that such expenditures would have to have been made from Fiscal's own funds, because the regulatory framework would not permit the County to make such expenditures from Public Funds. Penelas did not order this special audit to discover anything about Fiscal. Penelas ordered the audit to lay a framework for taking action against Fiscal and Grigsby (including the prosecution of Grigsby), to deflect public attention from the County's own corrupt activities at the Port, and to obtain the extra benefit of getting proprietary control of the business that Fiscal had developed over many years.

38. Acting rapidly on Penelas' order, Jackson, with the assistance of Bass, Baum, Deloitte and others, began in December 1996 to demand every accounting and financial document that Fiscal had ever generated. These burdensome document demands were also duplicitous, since the County already had both Fiscal's comprehensive accounting information describing each and every expenditure, including all of the types of expenditures which Jackson was allegedly investigating (most of which were imposed by the County), and Fiscal's annual financial statements that had been reviewed by CPA's, separately audited in some years, and provided to the County. Fiscal nevertheless did its best to comply with the demands for voluminous documents.

39. For purely tactical purposes and to put added public pressure on Fiscal, the County filed in February 1997, a wholly unnecessary Public Records Act action (Metropolitan Dade County v. Fiscal, 11th Judicial Circuit, Dade County, Case No. 97-04449 CA 32) against Fiscal, seeking to have Fiscal declared to be "a public agency."

40. During this same time period (early 1997), the Defendants enlisted Deloitte in their campaign against Fiscal

and Grigsby. Deloitte, which had been auditing the Port's financial statements for approximately twelve years, actively worked with Jackson, Bass, Baum and others in pressuring Fiscal for extensive unnecessary documents. Deloitte also began to confer with Jackson, Bass, Baum and others with respect to a change in Deloitte's accounting treatment of the Crane User Fees to support the Defendants' emerging plan to use allegedly improper expenditures of "Public Funds" as a pretext to seize Fiscal's business and to procure the indictment and seizure of Grigsby. To facilitate this scheme, Deloitte agreed to delay its audit for fiscal 1996 -- an audit which would normally have been completed in January of 1997 -- in order to co-ordinate its audit report with the special audit that Jackson was preparing at Penelas' direction and with Bass' assistance and input.

41. With its audit report for fiscal 1996 on hold, Deloitte began to pressure the Controller of the Port, Richard Myers, to change the Port's own statement of revenues and expenses to treat the Crane User Fees paid to Fiscal by Fiscal's customers as "County Money" and "Public Funds." Myers properly refused to make this change, after many years of reporting the Crane User Fees as the property of Fiscal, because there was no accounting justification for the change. In March 1997, Myers wrote in a file memorandum that "I've told them [Deloitte] I won't book this entry until I receive written documentation that shows objective criteria they used as a basis." Deloitte persisted in trying to force the change, but was never able to provide an accounting justification for the change. In September, 1997, Myers wrote in a memorandum to Blanca Padron of the County's Finance Department "we should require [Deloitte] to reverse their entry to 'gross up' the crane revenues and expenses unless they provide us with the support for the entry. I have made this request to Deloitte at least 10 times."

42. Meanwhile, on May 21, 1997, Alonso, Chairman of the Maritime and Trade Committee of the Board, convened a special meeting of that committee. Alonso was the only Commissioner present. Also present were Bass, the County Manager, several assistants and clerks, and three representatives of Deloitte. This meeting was not an honest attempt to obtain information previously unknown in order to protect the public interest. This meeting was another calculated step further setting the stage for action to terminate the franchise held by Fiscal, to terminate the implementing contract, to seize Fiscal's entire business just as it was about to become profitable, to make Grigsby a scapegoat in order to deflect attention away from the misbehavior of the County's own officials, and to procure an indictment and seizure of Grigsby.

43. During this meeting, Alonso brought up the Fiscal/County arrangement with Bass, providing Bass with a platform to present the Defendants' fabricated assertion that Fiscal's expenditures constituted the theft of "Public Funds." Bass falsely stated that the Crane User Fees were County Money that had been misappropriated by Fiscal.

44. On June 10, 1997, Jackson prepared a memorandum to the County Manager titled "Gantry Crane Operation Alternatives," stating that "three management alternatives appear desirable." Jackson's special audit was not anywhere near completed at that point, but it was obvious that the Defendants had a predetermined goal to take Fiscal's business: all of the "alternatives" involved eliminating Fiscal and either replacing Fiscal with another company or taking over the operation directly, despite the fact that Fiscal's exclusive franchise and the implementing contract, did not expire until at least 2002.

45. Further increasing the pressure, the County filed a breach of contract action against Fiscal, Grigsby and other

individuals in July of 1997 (Metropolitan Dade County v. Fiscal et. al, 11th Judicial Circuit, Dade County Case No. 97-15083-CA-32, the "Civil Action"), relying principally on the fabricated allegations of theft of "Public Funds".

46. Applying additional pressure, in September 1997, Bass and Jackson, acting through a subordinate, Pedro Velar, fabricated an unrealistically low proposal for the annual fixed fee to be paid to Fiscal for the next fiscal year. The County's proposal was about half the amount of the annual fixed fee previously agreed to, about half the size of competitive bids that were later received by the County to do Fiscal's job, and about half what the County actually paid to a new operator after it unlawfully seized Fiscal's entire business in 1998.

47. Further increasing the pressure to drive Fiscal and Grigsby out, Jackson and Bass, working with Jackson's assistant, Ann Lee, presented the Federal Bureau of Investigation and other representatives of the United States Attorney's Office with fabricated evidence that Grigsby had used "County Money" and "Public Funds" to make unauthorized expenditures not directly related to crane operations, thereby, they alleged, stealing County money. This fabricated evidence resulted in the capricious prosecution of Grigsby for theft of public funds and the attendant seizure of Grigsby.

48. When the Defendants fed this charge to the federal authorities, they had exclusive and superior knowledge of the design and history of the underlying franchisee/independent contractor relationship between Grigsby and the County -- information which would have demonstrated to the federal investigators that the "public funds" assertion was false. Instead of presenting this information honestly, they withheld the pertinent facts and gave the authorities only

selective information, thereby misleading the investigators and the prosecutors, who then misled a grand jury. This produced a capricious prosecution that was doomed to fail eventually but achieved the Defendants' immediate goal of severely damaging Grigsby and deflecting attention from the corruption of their own organization.

49. On January 16, 1998, Jackson produced the special audit of Fiscal that Penelas had directed, with the conclusions and recommendations that Penelas wanted. Using the fabricated "Public Funds" assertion as the foundation, Jackson stated that Fiscal had "misspent public funds." Further, Jackson recommended that the County "immediately sever its relationship with [Fiscal]" and further stated that the County should "assume immediate control of the operation," while seeking a replacement for Fiscal.

50. Jackson's report falsely stated that "Public Funds" were spent for political contributions, professional services of no value, meals and entertainment with no business purpose, and personal items. The report did not disclose that any such expenditures were made by Fiscal out of its own funds, usually in response to County demands, and were documented and fully disclosed by Fiscal to the County. The report also did not disclose that Penelas and Alonso had both chaired the Maritime and Trade Committee during Fiscal's tenure and were both well aware of the manner in which County officials took advantage of Fiscal and others working at the Port to obtain funds for a wide range of purposes not directly related to their business.

51. On February 20, 1998, Deloitte issued its long-delayed audit report of the Port for fiscal 1996. With no supporting accounting justification, this audit report simply "restated" the Port's 1995 financial statements solely to support the Defendants' theft of "Public Funds" assertion and the

prosecution of Grigsby. The restated audit report, contrary to Deloitte's audit reports for many years to the contrary, treated the Crane User Fees as "County Money." The audit report also changed, from $2,400 to in excess of $6 million, the amount of federal funds received by the Port in 1995, for no reason other than to provide a jurisdictional prerequisite for the prosecution of Grigsby under 18 U.S.C. §666. These same altered accounting treatments were applied to the 1996 financials of the Port as well.

52. In the spring of 1998, armed with Jackson's internal audit report and Deloitte's now restated audits, the Defendants took matters into their own hands. In an exercise of pure power, without waiting for the niceties of the Civil Action to be concluded, the County issued a notice of default and then unilaterally terminated the franchise and the implementing contract. On April 21, 1998, a new County Manager (who had assumed the position approximately one month previously) was given a resolution to present to the Board, approving the termination of the franchise and the implementing contract. The resolution was sponsored by Alonso, prepared by other Defendants, and approved as to form and legal sufficiency by Bass. The resolution referred to Jackson's January 16, 1998 audit report as having "found, among other things, 'mismanagement of the County's gantry crane operation, wasteful and abusive spending practices, [and] undocumented and unauthorized transactions....'" The resolution also stated "it is believed that Fiscal is currently retaining hundreds of thousands of collected user fees belonging to the County, in violation of contract requirements." Noting Jackson's recommendation that the County assume control of the crane operation "as soon as practical," the resolution directed the new County Manager to do so. To support the resolution, the new County Manager was also given a memorandum, prepared by the Defendants, recommending approval of the resolution to terminate the Agreement. That memorandum contained several

material misrepresentations, designed to support the Defendants' theft of "Public Funds" assertion.

53. With this background, the County Commissioners passed the resolution. Penelas, of course, did not veto.

54. On May 18, 1998, acting in accordance with Jackson's statement that "the County should take immediate control of the operation," but with no judicial process of any kind, the County physically seized Fiscal's entire business, including the personal property and other assets of Fiscal, and began to run the business for its own benefit. Shortly thereafter (on May 28, 1998), the indictment of Grigsby which the Defendants had procured with false evidence issued.

55. The indictment produced a judgment of acquittal, entered June 7, 1999, at the close of the Government's case, which exposed the falsity of the evidence the Defendants had fabricated and provided to secure the indictment. The judgment concluded that, viewing the evidence in the light most favorable to the Government, the alleged improper expenditures by Fiscal and Grigsby could not possibly have involved the expenditure or theft of "County Money" or "Public Funds" belonging to the County. The judgment specifically stated that the "Public Funds" assertion "ignores established principles of agency, the terms of the 1988 Agreement, the manner in which both Fiscal and the County treated and reported the revenues, and Florida law pertaining to obligations under a contract." The judgment also detailed many examples of the role of County officials in directing most of the alleged improper expenditures that the Defendants used as a pretext to seize Fiscal's business and to instigate the prosecution.

56. This entire scheme to appropriate Fiscal's business and instigate a capricious prosecution and seizure of Grigsby was organized, directed, and sanctioned by the Defendants, who abused broadly delegated uncircumscribed power over the Port to deprive Fiscal and Grigsby of their Constitutional rights, in a deliberate manner with predictable results. This was not a series of random, unauthorized acts by wayward employees.

57. The Defendants' actions were not reasonable when measured by any objective legal standard and violated clearly established Constitutional rights of Fiscal and Grigsby, about which a reasonable person would have known. The County Defendants knew, at all relevant times, that they had deliberately fabricated the "Public Funds" assertion that they used as a pretext for terminating Fiscal's franchise and the implementing contract. They also know, at all relevant times, that they had no legitimate basis for seizing Fiscal's business and property and instigating a prosecution and seizure of Grigsby. The Defendants' predatory actions are explainable only as calculated actions intended to take proprietary control of a private business which did not belong to them and to deflect attention away from the improper activities of elected and appointed County officials by setting up a scapegoat. For its part, Deloitte knew that it had no accounting justification for reversing its accounting treatment of the crane revenues and knew that it was "restating" its treatment at the request of the County to assist the County in taking these predatory actions against Fiscal and Grigsby.

58. Fiscal and Grigsby have been severely injured by these Constitutionally impermissible actions. Fiscal has been deprived of an entire business and all of the assets that it developed to conduct that business. Grigsby has been subjected to extreme harassment and intimidation, loss of personal control over his life and business, severe harm to his reputation, loss of

business and employment opportunities and the severe financial and emotional strain of preparing and presenting a defense to the fabricated charges. In carrying out this abuse of power for these improper motives, the Defendants were motivated by malice and acted with reckless indifference to the Constitutionally-protected rights of Fiscal and Grigsby.

V. CAUSES OF ACTION

COUNT 1
DENIAL OF DUE PROCESS
(FIFTH AND FOURTEENTH AMENDMENTS)
(Fiscal v. All Defendants)

59. The allegations of Paragraphs 1 through 58 are incorporated here by reference.

60. Defendants' actions in (a) unilaterally terminating Fiscal's twenty-year exclusive franchise and the implementing contract, and (b) and seizing Fiscal's business assets were undertaken for improper motives unrelated to any legitimate governmental purpose and were carried out by means that were pretextual and arbitrary and capricious. The Defendants' actions were motivated by bias and bad faith and were taken by the Defendants for the illegitimate purposes of increasing their proprietary control of the Port and taking unwarranted public action against Fiscal in order to deflect attention away from the improper activities of County officials. The reason that the Defendants gave for terminating the franchise and seizing Fiscal's business -- theft of "Public Funds" -- was fabricated and pretextual.

61. The Defendants knew that the "County Agent" and "Public Funds" assertion which they used in order to terminate the franchise and the implementing contract for

alleged theft of Public Funds was a false charge which they deliberately fabricated in order to take these illegal actions. The Defendants also knew that the bulk of the unauthorized expenditures that they cited were expenditures that County officials themselves had procured, either directly or indirectly. Defendants also knew that Fiscal's performance under the franchise had been exemplary and that there was no performance based reason for terminating the franchise.

62. The Defendants' actions were unreasonable by any objective standard. Fiscal had a clearly established legal right to retain its franchise, its rights under the implementing contract, and its business assets free of predatory governmental confiscation unrelated to any legitimate governmental purpose and carried out by dishonest and pretextual means.

63. Fiscal has been severely injured by this violation of its due process rights, and it is entitled to an award of compensatory damages from each of the Defendants, according to proof, in amounts to be established at trial.

64. In taking their egregious actions, the Defendants were motivated by malice and acted with reckless indifference to the Constitutional rights of Fiscal, and Fiscal is entitled to an award of punitive damages, from each of the Defendants, according to proof, in amounts to be established at trial.

COUNT 2
TAKING WITHOUT JUST COMPENSATION
(FIFTH AND FOURTEENTH AMENDMENTS)
(Fiscal v. All Defendants)

65. The allegations of Paragraphs 1 through 58 are incorporated here by reference.

66. In addition to terminating the franchise and the Agreement, the Defendants denied Fiscal's management access to Fiscals own secure, fenced work area, using posted armed security guards to prevent access. The Defendants then took possession of Fiscal's procedure manuals, appropriated Fiscal's business methods, and began using over $1,000,000 worth of Fiscal's tools, spare parts, and equipment, without any compensation to Fiscal.

67. This seizure of Fiscal's operating assets -- an outright physical invasion backed by police power -- was carried out by the Defendants so that the County could start managing the gantry cranes for its own account with private (i.e., Fiscal's) assets, without paying anything for those assets. By their actions, the Defendants unfairly and unjustly forced Fiscal to bear a public burden which should have been borne by the County as a whole and unjustly interfered with Fiscal's reasonable investment-backed expectations in developing its business assets for its own use.

68. The Defendants did not provide any procedure by which Fiscal could seek just compensation for this unlawful taking of its property.

69. The Defendants' actions in taking Fiscal's property were unreasonable by any objective standard. Regardless of whether the franchise and the implementing contract were still in effect, Fiscal had a clear legal right to retain its own personal property for its own use and to be free from governmental confiscation of its property for public use without compensation.

70. Fiscal has been severely injured by this unlawful taking, and it is entitled to an award of compensatory damages

from each of the Defendants, according to proof, in amounts to be established at trial.

71. In taking Fiscal's property, the Defendants were motivated by malice and acted with reckless indifference to the Constitutional rights of Fiscal, and Fiscal is entitled to an award of punitive damages, from each of the Defendants, according to proof, in an amount to be established at trial.

COUNT 3
DENIAL OF DUE PROCESS
(FIFTH AND FOURTEENTH AMENDMENTS)
(Grigsby v. All Defendants)

72. The allegations of Paragraphs 1 through 58 are incorporated here by reference.

73. The deliberate fabrication of incriminating evidence violates Constitutional rights, regardless of the prosecutor's ignorance of the falsified character of the evidence. In this case, the Defendants, with the assistance of Deloitte and others, fabricated evidence to the effect that Grigsby had stolen "Public Funds" and used that fabricated evidence to deceive federal prosecutors into initiating a grand jury proceeding (where the jurors were similarly deceived) and a subsequent prosecution.

74. The Defendants deliberately fabricated this evidence in pursuit of their illegitimate goal of driving Grigsby and Fiscal out of the Port, in order to increase their proprietary control over the Port and to deflect attention away from the corrupt activities of public officials at the Port. It was the Defendants' intention to instigate a prosecution, which they knew would be based on false evidence. Defendants believed

the prosecution would focus the public's attention on Grigsby's alleged guilt, rather than the corrupt actions of public officials, and would also disable Grigsby in his attempts to defend his business and obtain damages for the illegal termination of Fiscal's franchise and the implementing contract and the appropriation of Fiscal's business assets.

75. The Defendants' actions in fabricating this evidence and using the fabricated evidence to deceive the federal prosecutor and instigate a capricious prosecution were deliberate violations of Grigsby's rights. The Defendants, knowing that the "Public Funds" accusation which they made was a fabrication, exploited their exclusive and superior knowledge of the underlying relationship and arrangement between Grigsby and the County to hide the pertinent facts from the authorities, selectively feeding in only that information which appeared to support the fabricated charge. Among other things, the Defendants knew that Grigsby was a franchisee/independent contractor operating with his own funds, that the bulk of the expenditures of so-called "Public Funds" which they reported were expenditures that County officials, themselves, had procured, either directly or indirectly, and that the expenditures, by definition, could not be solicited from "Public Funds." Defendants also knew that they were instigating the prosecution, not for any legitimate public purpose, but for the illegitimate purposes of increasing their proprietary control over the Port and deflecting public attention away from the corrupt activities of public officials.

76. The Defendants' actions were unreasonable and illegal by any objective standard. The fabrication of incriminating evidence is a clearly-established violation of Constitutional rights, regardless of the prosecutor's knowledge of the falsity of the evidence, and Grigsby had a clearly-established due process right to be free of capricious proceedings instigated by third parties, with fabricated evidence

for illegitimate motives, where the prosecutor and grand jury were deceived by the fabrication into believing that probable cause existed.

77. The prosecution resulted in a judgment of acquittal following the presentation of the Government's case, which included a flat rejection of the "Public Funds" assertion that the Defendants had deliberately fabricated. Although no conviction resulted, Grigsby was subjected to extreme harassment, intimidation, burden, and cost as a result of the prosecution, was temporarily disabled in his attempts to obtain compensation for the illegal appropriation of Fiscal's business, and has suffered long-term, material reputation and business damage, which has not been appreciably alleviated as a result of the acquittal.

78. Grigsby has been severely injured by this violation of his Fifth and Fourteenth Amendment rights, and he is entitled to an award of compensatory damages from each of these Defendants, according to proof, in amounts to be established at trial.

79. In taking their egregious actions, the Defendants were motivated by malice and acted with reckless indifference to the Constitutional rights of Grigsby, and Grigsby is entitled to an award of punitive damages, from each of the Defendants, according to proof, in amounts to be established at trial.

COUNT 4
UNREASONABLE SEIZURE AND RESTRAINT
(FOURTH AND FOURTEENTH AMENDMENTS)
(Grigsby v. All Defendants)

80. The allegations of Paragraphs 1 through 58 and 73 through 79 are incorporated here by reference.

81. Using deliberately fabricated selective evidence while withholding the underlying pertinent facts, the Defendants deceived the prosecutor into believing that probable cause existed and proximately caused the deception of the grand jury, the initiation of a prosecution that was not backed by probable cause, and an unlawful seizure and restraint of Grigsby.

82. As a consequence of the wrongful actions of the Defendants, Grigsby was unlawfully seized and restrained (i.e., seized and restrained without probable cause) in that he was forced to surrender his person to authorities, to satisfy bail requirements, to surrender his passport, to report to a pretrial services unit on a weekly basis, to appear in court for many days over many months at the Government's command, to suffer severe loss of business and employment opportunities, to suffer severe reputational harm, and to experience the severe financial and emotional strain of preparing and presenting a defense to the fabricated charges.

83. Grigsby has been severely injured by this unlawful seizure and restraint, in violation of his Fourth and Fourteenth Amendment rights, and he is entitled to an award of compensatory damages from each of the Defendants, according to proof, in amounts to be established at trial.

84. In taking this egregious action, the Defendants were motivated by malice and have acted with reckless indifference to the Constitutional rights of Grigsby, and Grigsby is entitled to an award of punitive damages, from each of the Defendants, according to proof, in amounts to be established at trial.

COUNT 5
CONSPIRACY
(FOURTH, FIFTH AND FOURTEENTH AMENDMENTS)
(Grigsby and Fiscal v. All Defendants)

85. The allegations of Paragraphs 1 through 84 are incorporated here by reference.

85. The Defendants agreed, combined, and conspired in a concerted course of action to deprive Fiscal and Grigsby of their Constitutional rights by fabricating false and incriminating evidence and then using the fabricated evidence to confiscate Fiscal's business and property, in violation of the Fifth and Fourteenth Amendments, and to instigate a capricious indictment, prosecution and seizure of Grigsby, in violation of the Fourth, Fifth and Fourteenth Amendments.

86. Each of the Defendants contributed directly to the agreed process that caused these violations of Fiscal and Grigsby's rights. Penelas maliciously ordered an improper special "audit" of Fiscal (a private company, whose only relationship to the County was that of a franchisee/independent contractor) to lay a framework for falsely accusing Fiscal and Grigsby of improper expenditures of purported "Public Funds" and taking action against Fiscal and Grigsby based on that accusation. Jackson, with Penelas' approval and with the assistance of Bass, Baum and Deloitte, attacked Fiscal with an improper and unwarranted "public records" demand and a wholly unnecessary lawsuit based on the demand.

87. Bass and Jackson, acting in accordance with Penelas' wishes, fabricated the "Public Funds" description of Fiscal's revenues and, with the assistance of Baum, persuaded Deloitte to delay and then improperly alter its audit reports to (a) conform with the fabricated "Public Funds" concept and (b)

provide a jurisdictional basis for a federal prosecution of Grigsby.

88. Alonso conducted a sham hearing in May of 1997 to provide Bass and Deloitte with a platform to present the Defendants' false accusation of improper expenditures of "Public Funds." The following month, Jackson presented the County manager with a set of alternatives for the prospective operation of Fiscal's business, all of which involved eliminating Fiscal.

89. On January 16, 1998, Jackson issued the special audit report that Penelas had directed, accusing Fiscal of improper expenditures of "Public Funds" and recommending that the County take Fiscal's business and refer the improper expenditures of "Public Funds" to criminal authorities. On February 20, 1998, Deloitte, having waited to see Jackson's report so that it could assure that its supposedly independent audit report would be consistent, issued its long-delayed report "restating" its 1995 findings to accomplish the objectives of the conspiracy, observing that the matter was being referred to authorities.

90. In April, 1998, Alonso sponsored and put on the County Commission agenda a resolution, prepared by the Defendants, to approve the unilateral termination of Fiscal's franchise and the implementing contract and to confiscate Fiscal's business immediately, based on the findings and recommendations in Jackson's January, 1998 audit report. To support the resolution, the Defendants prepared a memorandum which contained several major misrepresentations. After the Commission passed the resolution, Penelas, knowing that he had set up the entire course of action on a fabricated premise, kept the truth secret and approved the resolution.

91. On May 18, 1998, the County Manager, acting on Jackson's statement that the County should take immediate control of Fiscal's business, seized the entire business. Meanwhile, Jackson and Bass, working with Jackson's assistant Ann Lee, had been feeding the fabricated theft of "Public Funds" assertion to the prosecuting authorities, producing the misguided indictment on May 28, 1998 and the prosecution, seizure, and restraint that followed.

92. The Defendants devised and implemented this agreed scheme motivated by the illegitimate goals of taking proprietary control of Fiscal's business and deflecting public attention away from the corrupt actions of public officials by making Fiscal and Grigsby scapegoats. The Defendants acted with a unity of purpose and a common design to violate the Constitutional rights of Fiscal and Grigsby.

93. Grigsby and Fiscal have been severely injured by this conspiracy to violate their Constitutional rights, and they are entitled to an award of compensatory damages from each of the conspirators, according to proof, in amounts to be established at trial.

94. In taking this egregious action, the conspirators were motivated by malice and acted with reckless indifference to the Constitutional rights of Fiscal and Grigsby, and Fiscal and Grigsby are entitled to an award of punitive damages from each of the conspirators, according to proof, in amounts to be established at trial.

COUNT 6
ACCOUNTANT'S FRAUD
(Grigsby and Fiscal v. Deloitte)

95. The allegations of Paragraphs 1 through 58 are incorporated here by reference.

96. An independent certified public accountant such as Deloitte has a public responsibility and duty which transcends any employment relationship with the client. This public duty demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust.

97. In this case, Deloitte violated its public duty by fraudulently reversing its accounting treatment of the crane revenues, at the request of the other Defendants, thereby enabling the other Defendants to take the predatory actions against Fiscal and Grigsby described above, which they commenced shortly after Deloitte issued its "restated" audit findings.

98. Deloitte's reversal of its audit findings at the request of the other Defendants, with no accounting justification, was a deliberate false representation, which Deloitte made with knowledge of its falsity and with the intent of enabling the other Defendants to use the representation to deceive others (e.g., federal investigators) who would reasonably rely on the truth of the representation.

99. This fraudulent misrepresentation by Deloitte was a material element of the Defendants' scheme to appropriate Fiscal's business and procure a capricious prosecution of Grigsby and was a proximate cause of the consequent injury to Fiscal and Grigsby. The other Defendants likely would not have proceeded with the confiscation of Fiscal's business and the instigation of Grigsby's prosecution if Deloitte had not agreed to reverse its longstanding audit treatment of the crane revenues.

100. Grigsby and Fiscal have been severely injured by Deloitte's fraud, and they are entitled to an award of

compensatory damages from Deloitte, in an amount to be established at trial.

101. In taking this fraudulent action, Deloitte acted with malice and with reckless indifference to its public duty and to the rights of Fiscal and Grigsby, and Fiscal and Grigsby are entitled to an award of punitive damages from Deloitte, in an amount to be established at trial.

COUNT 7
MALICIOUS PROSECUTION
(Grigsby v. All Defendants)

102. The allegations of Paragraphs 1 through 58 are incorporated here by reference.

103. The criminal proceeding against Grigsby, which terminated with a judgment of acquittal after the presentation of the government's case, was commenced without probable cause.

104. The proceeding was instigated and caused solely by the fraudulent actions of the Defendants, who maliciously fabricated selective evidence and transmitted that evidence to federal investigators, exploiting their exclusive and superior knowledge of the pertinent facts to withhold information from the investigators which would have demonstrated that their charge of "theft of public funds" was false. In this manner, they mislead the investigators and the prosecutors who, in turn, misled the grand jury that issued the indictment.

105. Grigsby was severely injured by this malicious prosecution, and he is entitled to an award of compensatory damages from each of the Defendants, according to proof, in amounts to be established at trial.

106. In instigating this malicious prosecution, the Defendants were motivated by malice and acted with reckless indifference to Grigsby's rights, and Grigsby is entitled to an award of punitive damages from each of the Defendants, according to proof, in amounts to be established at trial.

RELIEF REQUESTED

WHEREFORE, plaintiffs Fiscal and Grigsby pray for the following relief:

A. An award of compensatory damages from each of the Defendants, according to proof, in a cumulative amount sufficient to compensate Fiscal and Grigsby for the Defendants' deprivation of their rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution and under the laws of Florida;

B. An award of punitive damages against each of the individual Defendants, according to proof, in amounts to be determined at trial;

C. An order awarding to Fiscal and Grigsby their costs and attorney fees in bringing this action, pursuant to 42 U.S.C. 1988; and

D. Such other and further relief as the Court deems just and proper.

Calvin B. Grigsby
Pro Hac Vice Application Pending
311 California Street
Suite 320
San Francisco, CA 94104-2605

TEL: 415 392-4800
FAX: 415 676-2445
CA BAR NO.: 53655

3

No. 04-134

Supreme Court, U.S.
FILED
AUG 2 4 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CALVIN GRIGSBY,

Petitioner,

v.

MIAMI-DADE COUNTY, FLORIDA, STEVEN B. BASS, ALEX PENELAS, KATHY JACKSON, MIRIAM ALONSO, RACHEL BAUM, and DELOITTE & TOUCHE LLP,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

JOEL D. EATON, ESQ.
Counsel of Record

PODHURST ORSECK, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800/Fax (305) 358-2382

Attorneys for Respondent Deloitte & Touche LLP

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BRIEF IN OPPOSITION

The respondent, Deloitte & Touche LLP ("Deloitte"), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eleventh Circuit's *per curiam* affirmance of the district court's decision in this case.

REASONS FOR DENYING THE WRIT

1. The decision below does not raise the first Question Presented in the petition.

In the first Question Presented, the petitioner asserts that the district court dismissed his Fourth Amendment "continuing seizure" claim against all defendants for failure to state a claim. With respect to Deloitte, that much is true. But the petitioner goes on to suggest that the dismissal was based upon the district court's refusal to recognize the viability of such a claim under the Fourth Amendment. That much is not true. The district court's several opinions, read together, clearly reveal that the district court in fact accepted the petitioner's contention that the Fourth Amendment provides a constitutional right to be free from an unreasonable "continuing seizure." What the district court did not accept was the petitioner's argument that the allegations in his amended complaint supported such a claim. The district court's dismissal of the petitioner's Fourth Amendment claim was based on its conclusion that the facts alleged in the petitioner's amended complaint failed to support such a claim. The Eleventh Circuit's *per curiam* affirmance of the district court's decision therefore does not raise the first Question Presented in the petition.

Count III of the amended complaint alleged a violation of the petitioner's due process rights under the Fifth Amendment by all defendants (100a-02a). Based upon the same facts, Count IV alleged an unreasonable seizure and restraint under the Fourth Amendment by all defendants (102a-03a). In essence, the two counts simply asserted two theories of liability upon a single set of facts. Accordingly, in granting Deloitte's motion to dismiss, the district court examined, discussed, and disposed of the two counts together (56a-59a). The district court began its analysis of the two counts by acknowledging that the petitioner had established the existence of a due process right on the facts alleged. Although it did not specifically reference the Fourth Amendment in the analysis that followed, there is nothing in its opinion to indicate any rejection of the petitioner's contention that the Fourth Amendment provides a right to be free of an unreasonable "continuing seizure."

To the contrary, in fact, what follows in the opinion demonstrates that the court fully recognized such a right, since it dismissed Counts III and IV of the complaint on entirely different grounds. Specifically, with respect to Deloitte, the district court dismissed both counts based on its conclusions that the allegations of the complaint were "vague and conclusory"; that the complaint failed to allege any facts demonstrating a causal connection between Deloitte's audit work and the petitioner's subsequent criminal prosecution; and that, in any case, any causal connection that may have existed was "severed by the intervening, free, independent and volitional acts of the FBI, the U.S. Attorneys' Office and the grand jury" (51a-58a).

The companion opinion in which the district court granted the other defendants' motion to dismiss further underscores the conclusion that the district court's dismissal of the petitioner's Fourth Amendment claim does not raise the first Question Presented. In that opinion, as it did in its opinion disposing of Deloitte's motion to dismiss, the district court examined, discussed, and disposed of Counts III and IV together (19a-21a). The district court explicitly acknowledged the existence of both constitutional rights claimed by the petitioner, but concluded – for reasons essentially the same as those it expressed in granting Deloitte's motion to dismiss – that the allegations of the complaint were insufficient to demonstrate a violation of those rights:

> . . . In sum, Plaintiffs allege that the Defendants deceived prosecutors in violation of their Fourth and Fourteenth Amendment rights, but they fail to allege any facts which, if true, . . . would establish that the Defendants caused any such violation. Because Plaintiffs have failed to allege that the Defendants' conduct constituted a constitutional violation, the Defendants are entitled to qualified immunity as to Counts III and IV of the Complaint.

(21a).

In this Court, the petitioner does not question the district court's rulings on the factual insufficiencies in his complaint. The only ruling he questions is one that was entirely favorable to him below. The Eleventh Circuit's *per curiam* affirmance of the district court's decision therefore does not raise the first Question Presented in the petition.

2. The second Question Presented in the petition does not affect this respondent.

The second Question Presented in the petition is relevant only to the petitioner's claims against respondent Bass, and does not implicate the petitioner's claims against Deloitte. Accordingly, we will not respond to it.

CONCLUSION

For these reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

JOEL D. EATON, ESQ.
Counsel of Record

PODHURST ORSECK, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800/Fax (305) 358-2382

Attorneys for Respondent
Deloitte & Touche LLP